THE CONTROL OF FOREIGN FUNDS BY THE UNITED STATES TREASURY

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> Finance is not dramatic. Its obvious use and function in industry appear its only use and function. Finance is impersonal; it will serve any master and will organize with equal facility production of the comforts of peace or the sinews of war. Finance is not concerned with morals; it supplies the goods and services desired, regardless of intended use; whatever is wanted may be had at a price.

Time was when men of good will believed that finance—international finance—could lead only to international peace. Its very operations would bind men and nations closer and closer into a unified, necessarily-cooperating, world-wide economic system, each part so dependent on every other that no nation would dare jeopardize its own welfare by disrupting, through war, the delicate balance.[1] This idea, too, had the sanction of classical economics.[2] When this dream of peace vanished in the chaos of World War I, an ideal was damaged but not wholly lost. For world reconstruction, international finance was again tried as a medium to bind together the shattered and broken countries, that each might be restored to a proper productive place in the society of nations; and as nations threatened to collapse, more financing was offered as the cure to avert the consequences for the benefit of all. With world-wide approbation the United States took a leading role in these financial plans. Now it is popularly said that the democracies through finance and resulting international trade unwittingly armed the aggressors to wage war against them.

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[1] NORMAN ANGELL, THE GREAT ILLUSION (New York, 1910), see particularly Chapters iii, "The Great Illusion," and iv, "The Impossibility of Confiscation"; DAVID STARR JORDAN, UNSEEN EMPIRE (Boston, 1912); DAVID STARR JORDAN, WAR AND WASTE (New York, 1913) 251-252: "What shall we say of Pearl Harbor, our new stronghold of the sea? . . . Once in a century a nation can fight as Japan fought in Manchuria [1904-5]. That was the last time. Before the next century comes, the combined work of commerce, civilization and finance will put an end to international struggles." (From 23rd essay, "Pearl Harbor.")

[2] JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY (Ashley ed.) Book III, Chapter xvii, 582: "Finally, commerce first taught nations to see with goodwill the wealth and prosperity of one another. . . . It is commerce which is rapidly rendering war obsolete . . . and it may be said without exaggeration that the great extent and rapid increase of international trade, in being the principal guarantee of the peace of the world, is the great permanent security for the uninterrupted progress of the ideas, the institutions and the character of the human race."

With the advent in Germany of National Socialism, fanatical yet competent men closely examined all elements of their situation and exploited every item of that confused and depressed time to prepare for accomplishment in the future of what had not been accomplished by a war of the past. World hegemony was the reason and justification of Nazism. Financial control was to be both means and result of this accomplishment.

The purposeful diversion of financial resources to war production is now recognized. It is less well understood that international finance also became in the hands of the Axis a new and different weapon; a subtle and secret weapon to stultify and make impotent the intended national victims before the dramatic entry of the armed forces.

To counter alien national financial policy, aggressively waged, domestic financial control is necessary. The United States Treasury exercised this domestic control over foreign funds; first for their protection, later for national defense, then for economic warfare.

How Did Germany Become Possessed of Financial Power and How Was It Used?

The financial position of Germany at the beginning of World War II was the result of many factors.

Reparations.—In 1918 Germany was a defeated and disorganized nation. But the war had not been fought on German soil. Physical destruction in the Fatherland was relatively absent. Other nations had suffered the damage, and reparations were imposed on Germany. "Complete information showing the total amount of reparations that Germany has paid under the Treaty of Versailles to the creditor governments is not available as no complete accounting was made on the reparation payments made prior to the adoption of the Dawes Plan on September 1, 1924."[3] For assistance of Germany in the debt funding agreement then entered into, bonds in the principal amount of 228 millions[4] of dollars were provided, of which 110 millions were issued in the United States, the rest in other countries. At the beginning of this war almost 60 millions of the dollar bonds were still outstanding and unpaid[5] although it is believed that most of them were repatriated to Germany before World War II.[6] A new plan for reparation payment, the Young Plan, superseded and was imposed upon the Dawes Plan on May 17, 1930. Under the Young

[3] "Memorandum covering the World War indebtedness of foreign governments to the United States (1917-1921), and showing the total amounts paid by Germany under the Dawes and Young Plans" (U. S. Treasury Department, Fiscal Service, Bureau of Accounts, Revised July 1, 1941) 34.

[4] The bonds which were issued and sold outside the United States were payable respectively in the currency of the country where issued. The figure given is the dollar face value of the total. BANK FOR INTERNATIONAL SETTLEMENT, FIRST ANNUAL REPORT (1931).

[5] FOREIGN BONDHOLDERS PROTECTIVE COUNCIL, INC., ANNUAL REPORT (1940) 44.

[6] Paul D. Dickens, *Status of United States Investment in Foreign Dollar Bonds, end of 1940,* FOREIGN COMMERCE WEEKLY, July 19, 1941, p. 3 *et seq.*

Plan, bonds in the principal amount of 351 millions[7] of dollars were issued; of these about 98 millions were dollar bonds. At the commencement of this war 91 millions of the dollar bonds were unpaid and outstanding but a majority of these likewise had been repatriated before the war.[8]

All reparations by Germany, whether in delivery of material or by international payment, ceased short of their goal, and bonds given for money borrowed were defaulted before maturity. In whatever way figures illustrative of the reparation story may be compiled and refined, it seems clear that at least after 1924, because of financial assistance rendered to Germany, obligations for reparations and reparation financing were not a serious drain on German economy.[9]

Internal Debt.—The accumulated internal debt of Germany, heavily increased by war financing, was to all practical purposes extinguished by the monetary inflation of 1923-4.

Municipal and Corporate Financing.—Between 1920 and 1933, about 125 municipal and industrial bond issues were floated in the United States for use in Germany. These aggregated well over one billion dollars.[10] The funds from this financing were conventionally used for the purposes for which borrowed: state and provincial projects, municipal improvements, housing projects, rehabilitation of public utilities, capital expansion and replacement of equipment, for shipping, steel making and other industries. The bonds were serviced until 1933, then defaulted, though certain offers of compromise were made. At the beginning of this war, there were over a half billion dollars face amount of these bonds outstanding and unpaid.[11] It is estimated[12] that probably four-fifths of them have been repatriated to Germany at huge discount.

Short-Term Trade Financing.—German industries discounted to American banks vast amounts of short-term credit instruments. The amount of this negotiable paper held by the American banks attained the figure of 350 millions of dollars.[13] In 1932, the American bankers, who believed that they had invested in short-term, self-liquidating credits, found instead that they held long-term loans of doubtful collectibility. Through the standstill agreements entered into in 1932, the form of this loan was retained, but a slow liquidation was contemplated. At the commencement of the war, it is estimated that probably not more than 40 millions of dollars of this obligation in the form of time bills were still held by American banks.[14] The

[7] (Face Value in Dollars), BANK FOR INTERNATIONAL SETTLEMENTS, FIRST ANNUAL REPORT (1931).

[8] Dickens, *supra* note 6.

[9] J. B. CONDLIFFE, THE INTERNATIONAL ECONOMIC OUTLOOK (New York, 1944) 17.

[10] U. S. DEP'T OF COMM., AMERICAN UNDERWRITING OF GERMAN SECURITIES (Trade Information Bulletin No. 648, 1929) 6.

[11] FOREIGN BONDHOLDERS PROTECTIVE COUNCIL, INC., ANNUAL REPORT (1940) 45, 46, 70.

[12] Dickens, *supra* note 6.

[13] U. S. DEP'T OF COMM., BALANCE OF INTERNATIONAL PAYMENTS OF THE UNITED STATES IN 1933 (Trade Information Bulletin No. 819, 1934) 83.

[14] U. S. DEP'T OF COMM., BALANCE OF INTERNATIONAL PAYMENTS, 1939 (Economic Series No. 8, 1940) 82.

rest had been liquidated by part payment and compromise, the banks over the several year period, having made the best bargain they could with debtors who could not be forced to pay.[15]

Depression.—German trade and industry were naturally affected by the world-wide depression beginning in 1929. However, even earlier than that German engineers and industrialists had begun to fear an overproduction. The period of preparing to produce was over, in their opinion, and unemployment threatened. Germany's rehabilitated industries could produce, but could they market what they produced? Increased governmental control of output, allocation of markets . . . in short, a more effective government-controlled cartel system was demanded.[16]

The depression gave the impetus to the Nazi Party. Its governmental controls were ready, and Germany, with her industries, was ready to accept National Socialism. Thereafter, there was but little unemployment in Germany . . . the factories produced at full capacity. Foreign trade was carried on to create foreign credits where needed. But it was production and trade not primarily for immediate prosperity and profit . . . it was production for a final and ulterior purpose, to prepare the Reich for future dominance.[17] This was the final use of all the accumulated financial resources.[18]

Munich.—The sequence of ominous events in Africa, Asia, and Europe from 1933 to 1938 need not be detailed. In 1938, after various demands and threats by Germany, came the agreement of Munich. This agreement was unilaterally enlarged by Germany, and the whole of Czechoslovakia was dominated. The world marveled at the military organization, the swiftness and might of the Panzer divisions. But gradually it became apparent that the invasion of Czechoslovakia in the first instance was not by the army. Before the occupation of Prague by the German army, key industries, including banks, had already become dominated by German finance. A corps of German officials was immediately ready to take over control; gold and securities were seized; exchange transactions were cleared through German-controlled banks; and literally in no time at all Germany had absorbed the immediately convertible wealth of Czechoslovakia and had turned the agriculture and industry of the country into an annex of the German economy.[19]

[15] U. S. DEP'T OF COMM., BALANCE OF INTERNATIONAL PAYMENTS, 1937 (Economic Series No. 3, 1938) 90.

[16] See speech by E. Schmalenbach in translation, in Journal of Commerce, New York, September 11, 15, 17 and 19, 1928, reprinted from original in Vossische Zeitung.

[17] Norman Crump, *Economics of the Third Reich* (1939) 102 J. ROYAL STAT. SOC. 167-198. Throughout the period of rehabilitation capital industries were expanded disproportionately to consumer industries.

[18] Germany also defaulted her obligations in other countries and creditors of various nations participated in the standstill agreements.

[19] Demaree Bess, *Nazi Germany's First Colony,* THE SATURDAY EVENING POST, Aug. 26, 1939, pp. 23, 46 *et seq.* For discussion of financial controls exerted by Germany on neighboring countries, see Crump, *op. cit. supra* note 17; for financial organization by Germany of conquered countries, see SHIELA GRANT DUFF, A GERMAN PROTECTORATE, THE CZECHS UNDER NAZI RULE (Macmillan, London, 1942) at 132-135; for German-controlled industry outside of the Reich, see Edward H. Levi, *International Cartels and the War,* in WAR AND THE LAW (University of Chicago Press, 1944).

Further expansion of the German Reich precipitated war and in the confusion which inevitably occurred, the pattern of industrial absorption of the countries successively occupied is somewhat less clear. But accounts continuously appearing in the public press all indicate the same financial preparation and use.

INCEPTION OF FOREIGN FUNDS CONTROL

On April 8, 1940, Germany invaded Denmark and Norway. The United States was neutral. It had not been a party to the Munich agreement. It had taken no official position in regard to the absorption of Czechoslovakia and the subjugation of Poland. It had remained watchful but hopefully waiting during that strange period of ominous quiet of the winter of 1939-40, the period of the "phony war." The spring of 1940 dispelled doubts as to Germany's immediate intention and of its power to carry out its objectives. This scheme of expansion by widening conquest, now more clearly evident, caused the United States grave concern.

In 1940 the United States was a storehouse of treasure for the world. From 1933 on, there had been a gradual shifting of credit and investment to this country. Various reasons may be suggested, but important among them was the desire of the oppressed people within Germany and later of inhabitants in neighboring countries to put their property in a place of safety. Securities and deposits had come in large quantities. Toward the last, gold and credits of governments and central banks had flowed here. In this regard the United States was at the moment something like the trustee of the patrimony of various endangered European nations. The property had been placed in the United States "out of confidence in our strength and fairness."[20]

Conquest, as an instrument of national policy, had been renounced by the United States.[21] It could not supinely permit a conquering nation to absorb those financial assets of the conquered country placed within the United States' keeping, yet protest it had not recognized the conquest of the country. Nor could this government refuse to protect American financial institutions from possible adverse claims which might arise from the conquest.[22]

Publication of the Executive Order.—The President, on April 10, 1940, issued Executive Order No. 8389, commonly called the "freezing order."[23] This action,

[20] Address of Edward H. Foley, Jr., General Counsel for the Treasury Department, "Freezing Control as a Weapon of Economic Defense," 64th Annual Meeting of the American Bar Association, Indianapolis, Ind., September 29, 1941.

[21] See "Treaty for the Renunciation of War as an Instrument of National Policy" (the Kellogg Pact), 1 U. S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES (1928) 153 ff.

[22] Senate debates on Joint Resolution of May 7, 1940—"Mr. Barkley. It should also be stated . . . that the joint resolution is intended not only to protect the nationals of Norway and Denmark who have interest in stocks, securities and other property in the United States, but it is also intended to protect American citizens in the event they have any claims of any sort growing out of these transactions and therefore we preserve the property not only for its owners but for the benefit of Americans who may have claims." "Mr. Wagner. Yes, we are also protecting the banks who may be called upon to make transfers of securities." 86 CONG. REC. 5006 (1940).

[23] 5 FED. REG. 1400 (1940). The Executive Order, and the regulations, general rulings, circulars,

taken under Section 5(b) of the Trading with the Enemy Act, as amended,[24] was promptly ratified by Congress.[25] In brief, the Order prohibited transactions relating to property of Denmark and Norway and their nationals unless permitted under license by the Secretary of the Treasury. Immediately after the issuance of the Order, the Foreign Funds Control was set up as the administrative agency within the Treasury Department.

In issuing the Executive Order the President had stressed the intention not to permit property in the United States of Denmark or Norway to be part of the fruits of Germany's conquest. That this was also the view of the Congress when it amended the Act and ratified the Order is clear.[26] The freezing order was one to protect the property within the United States of friendly aliens and thus confirm "an international belief and an international faith in the integrity of the United States government, that it will protect and safeguard and secure the property even of aliens that is legally and lawfully in the United States."[27] Yet to some in 1940 even this first freezing order for the protection of property of those nations and their nationals overwhelmed by war was considered a dangerous act of altruism in a matter in which the United States, they thought, had no real interest. They could not foresee the events to come.

Extension of Freezing to Other Countries of Europe.—Events moved quickly in Europe from April 8, 1940 and as each country was invaded that country was frozen by amendment to the Order: May 10, 1940—the Netherlands, Belgium, and Luxembourg; June 17—France (including Monaco); July 10—Latvia, Esthonia, and Lithuania; October 9—Rumania; March 4, 1941—Bulgaria; March 13—Hungary; March 24—Yugoslavia; April 28—Greece. Of these countries only Rumania, Bulgaria, and Hungary were to become enemies of the United States.

The position of the United States was becoming increasingly difficult for, as each country was conquered, the wealth of that country within the United States became an added international obligation. Ambulatory foreign capital seeking temporary investment or safe custody may even in normal times create problems within the country of its host. Had the Foreign Funds Control not been functioning, these alien funds might well have become a source of international embarrassment.

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and other public documents issued by the Secretary of the Treasury under the Trading with the Enemy Act, frequently are collectively referred to as the "freezing regulations." The Treasury has published from time to time a useful pamphlet entitled "Documents Pertaining to Foreign Funds Control" which contains the current versions of the documents and selected press releases. The latest compilation, issued on March 30, 1944, will be cited hereafter as "DOCUMENTS." The public documents also appear in the CODE OF FEDERAL REGULATIONS (Cumulative Supplement, 1944) title 31, subtitle B, Chapter I, parts 130-133, 137.

[24] Act of Oct. 6, 1917, 40 STAT. 415 (1917) as amended, 50 U. S. C. APP. (Supp. 1941-1943) §5.

[25] Joint Resolution of May 7, 1940, 54 STAT. 179. The ratification is judicially considered in United States v. Von Clemm, 136 F. (2d) 968 (C. C. A. 2d 1943), *cert. den.* 320 U. S. 769 (1943) and is discussed in McNulty, *Constitutionality of Alien Property Controls*, this symposium, *infra*, p. 135 at 136.

[26] Congress also recognized the possibility that although the Order applied only to Norway and Denmark, it could be extended. See 86 CONG. REC. 5006 (1940).

[27] Senator Connally in 86 CONG. REC. 5178 (1940).

The Course of Italy and Japan.—And at the same time international pressures were being exerted in other parts of the world. The course of both Italy and Japan had caused disquietude throughout the world for some years. Italy, the opportunistic junior European Axis partner, had thrown in its lot in active war with Germany shortly before the collapse of France. Italy had been one of the allies in the last war. It had remained on friendly terms with its former allies and its industries had benefitted by some financing. But it had turned Fascist and daydreamed of the glory that was Rome. Fascism could show in partial fulfillment of its promise the conquest of Ethiopia. Progressively alienated from the democracies and hopeful of easy booty it had joined with Germany.

Japan, chief ally of the Axis, had benefitted from the democracies but now became an actively collaborating Axis member. Japan also had been an ally of the victors in the last war and had gained considerably from its alliance. Its army and navy had been called upon but little. Its industries had profitably expanded. It had been the recipient of friendly foreign financing. It did not, as Germany, profit for the furtherance of its plans by the process of borrowing and default; its imperial and industrial bonds were serviced until World War II. Japan profited particularly by the complaisance of the democracies in its conquest in 1931 of Manchuria into which it had previously made economic penetration. Prior to World War II the financial and industrial organization of Manchuria had been leisurely completed. Since 1937 Japan had been attempting the conquest and absorption of China and at the same time, internally and by foreign trade, particularly with the democracies, was supplying itself for even greater conquest. To assist its own expansion by force, Japan eagerly endorsed the German plans of conquest.

The three Axis partners had certain similarities. All had actively adopted conquest as a national policy. All had profited by friendly relations with the democracies. Each had been able to secure the conquest and industrial and financial absorption of an important area without general war and was engaged in the conquest and absorption of others.

Now the world knows that those who hoped and believed that international finance would lead through world economic organization to universal peace were right in their first premise . . . it does make the world interdependent. They were wrong in believing that this mutual dependence alone would prevent wars, and they failed to see the possibility that one nation or group of nations would dare seek the control of this world organization for their own advantage. Bound together indeed the nations are, and when not united in the mutuality of universal peace, inevitably they are locked in the mutuality of universal war.

With conquest growing both in Europe and in Asia, the free use of credits within the United States would, in fact, have made the United States a substantial contributor to the cause of the invaders by acting as the financial medium for the supply of goods and services even though the Neutrality Act of 1939 forbade direct

trade with an aggressor.[28] Credits of the aggressors too could have been used for sabotage and espionage to the detriment of the United States and its world position. The unsupervised use by neutrals of their property might be contrary to necessary policies of the United States. And lastly the unanswered question became more insistent—had Germany and Japan, which had so carefully planned their economic and financial warfare elsewhere, overlooked the United States? Outposts were here in abundance, as for example, the branches and affiliates of I. G. Farben (Germany)[29] and Mitsubishi (Japan). Had a role been given to these outposts in the plan of world domination?

Economic Defense—The Amendment of the Executive Order, June 14, 1941.

In the face of growing world danger the United States took the next step for its protection on June 14, 1941. On this date an amendment[30] to the Freezing Order was published which added to the list of nations already frozen all the rest of continental Europe: the aggressor, the conquered, and the neutral nations.[31] The preamble to this Order carried the additional phrase not used in the previous Orders: "necessary in the interest of national defense and security." A few weeks later, July 26, 1941, when Japan overran Indo-China, Japan and China were added to this list. China was included at the request of its own government for its assistance and to prevent Japan from using the occupied areas in China as a base for evading the freezing control.[32]

The Order of June 14, 1941, remained the basic freezing order thereafter although countries as they were overrun were blocked.[33]

WAR—THE FIRST WAR POWERS ACT, 1941

Japan attacked Pearl Harbor on December 7, 1941 and declarations of war with

[28] 54 STAT. 4, 22 U. S. C. (1940 ed.) §§441-457.

[29] Levi, *op. cit. supra* note 19.

[30] EXEC. ORDER No. 8785, 6 FED. REG. 2897 (1941).

[31] Albania, Andorra, Austria, Czechoslovakia, Danzig, Finland, Germany, Italy, Liechtenstein, Poland, Portugal, San Marino, Spain, Sweden, Switzerland, and the Union of Soviet Socialist Republics were frozen by the Order of June 14, 1941. Only Turkey was excepted. Shortly after the amendment, the Soviet Union was attacked by Germany and was thereupon granted a general license which had the effect of completely remitting the control as to it. General License No. 51, 6 FED. REG. 3100 (1941).

[32] Press Release, July 26, 1941, DOCUMENTS (1944) *supra* note 23, at 106.

[33] By EXEC. ORDER No. 8963, issued December 9, 1941, 6 FED. REG. 6348 (1941), Thailand was added; EXEC. ORDER No. 8998, dated December 26, 1941, 6 FED. REG. 6785 (1941), added Hongkong. The latter order also contained a clause providing for the automatic inclusion of any area occupied or controlled by the armed forces of any blocked country. However, upon the occupation of the Philippines and British Malaya, the Treasury Department announced that these countries were deemed foreign countries separately designated in the Order. See Public Circulars No. 11 and 16, issued January 5 and February 18, 1942, 7 FED. REG. 147, 1126 (1942).

Although China, Japan, Thailand, Hongkong, and British Malaya were all frozen after June 14, 1941, the freezing in each case was as of that date. Practical problems of this retroactive freezing were obviated, however, by general licenses or equivalent provisions which in effect brought the freezing date in each case up to the date on which the Order was actually amended. See General Licenses No. 54, 76 and 78, 6 FED. REG. 3722, 6350, 6792 (1941), and Public Circular No. 16, *supra*. The freezing date as to the Philippine Islands was January 5, 1942, practically contemporaneous with the issuance of the freezing document, Public Circular No. 11, *supra*.

the Axis countries followed at once. On December 18, 1941, the First War Powers Act was passed. Title III of this Act amended Section 5(b) of the Trading with the enemy Act and conferred comprehensive authority to deal effectively with all ramifications of foreign property and foreign property ownership in the war emergency.[34] From discussions in Congress at the time, one may safely assume that Title III had been prepared by the executive branch of the government, particularly the Treasury and the Department of Justice. Its scope and the speed with which it was enacted could lead only to the inference that considerable attention had been given to the areas in which the powers previously granted by the Trading with the enemy Act were, or might be, inadequate for the grimmer phases of economic warfare. Thus Title III appears in the nature of a list or catalogue of powers and authorities for waging war on the financial front, and is a close-packed, broad delegation of powers. It was amended only once in Congress and the debate on the floor indicated no desire or effort to limit the powers but merely so to frame the Act, should any vesting of property occur, that careful reports would have to be made concerning such property. Unpleasant circumstances surrounding vested German property of the last war were to be avoided.[35]

In passing the First War Powers Act, Congress ratified everything which the President or the Secretary of the Treasury had done in respect to foreign property under the Trading with the enemy Act, as amended.[36]

From the time of the enactment of the First War Powers Act to February 12, 1942, no formal delegation of the additional powers granted by Title III was conferred upon any agency. On February 12, 1942, the President formally delegated all of his authority under Sections 3(a) and 5(b) of the Trading with the enemy Act to the Secretary of the Treasury,[37] who thereupon became the sole repository of the President's authority until the Office of the Alien Property Custodian was established on March 11, 1942.[38] Subsequently, on July 6, 1942, Executive Order

[34] 55 STAT. 839 (1941), 50 U. S. C. APP. (Supp. 1941-1943) §§5 and 616. The committee reports on the bill stressed the need of affirmative and flexible powers, H. R. REP. No. 1507, 77th Cong., 1st Sess. (1941) 3; SEN. REP. No. 911, 77th Cong., 1st Sess. (1941) 2.

[35] 87 CONG. REC. 9867 (1941). It will be noted that the language of the Act relating to reports is mandatory.

[36] The ratification clause of the First War Powers Act reads as follows: "All acts, actions, regulations, rules, orders and proclamations heretofore done, promulgated, made or ordered by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading with the enemy Act of October 6, 1917 (40 STAT. 411) as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are hereby approved, and ratified and confirmed." 55 STAT. 840 (1941), 50 U. S. C. APP. (Supp. 1941-1943) §617. As to effect, see McNulty, *op. cit. supra* note 25.

[37] Memorandum to the Secretary of the Treasury from the President, 7 FED. REG. 1409 (1942).

[38] EXEC. ORDER No. 9095, 7 FED. REG. 1971 (1942). The Order (Section 2) granted the Custodian all powers under Sections 3(a) and 5(b) except such as had been delegated to the Secretary of the Treasury "by Executive Orders issued prior to February 12, 1942." Certain purely domestic powers were reserved to the Federal Reserve Board. The Alien Property Custodian thereupon temporarily redelegated all his authority to the Secretary of the Treasury [Memorandum for the Secretary of the Treasury, March 11, 1942, 7 FED. REG. 2115 (1942)]. The redelegation was never expressly revoked but the situation was covered by the issuance of EXEC. ORDER No. 9193.

No. 9193[39] was issued under which certain functions were allocated to the Custodian, and the Section 3(a) powers and the residual authority under Section 5(b) were again conferred upon the Secretary of the Treasury.

THE THREE PHASES OF FOREIGN FUNDS CONTROL

The operations of Foreign Funds Control can roughly be divided into three phases: (1) the period of the protection of assets of conquered countries, from the inception of the Control to June 14, 1941; (2) the period of defense from June 14, 1941 to the declaration of war; and (3) the period of economic warfare thereafter. In some respects, however, this simplification of the Control obscures its development. It may in fact be said more accurately that the policies and efforts of the Control followed progressively the increasing danger to the United States—from the time of the mere declarations that interests in the property of Denmark and Norway could not be changed by reason of conquest, to the last period when efforts were made to hurt the Axis wherever possible by preventing the acquisition of raw material, use of credits, and any advantages from foreign investments. In each period, problems coming before the Control had provided experience and information by which the next step could be taken more effectively.

OBJECTIVES AND POLICIES

The original and continuing policies in regard to blocked funds within the United States do not seem well understood, and the Treasury appears at times to have been somewhat loathe to explain its purposes in this regard in detail. From the very inception of Foreign Funds Control, during the period of neutrality and throughout the war, the policy in regard to the blocked assets in the United States of invaded countries has remained virtually unchanged. A grasp of the fundamental policies is necessary for an understanding of all the work of the Control. The first property blocked was that of friendly invaded countries. To this property was added that of the aggressor nations, now enemies, and the property of the blocked neutral nations. An examination of the work of the Control for over four years and consideration of the transactions which it licensed or did not license show consistent policies in respect to blocked assets. Minor shifts and changes in execution may be seen; the basic objectives and the policies for achieving these objectives remained the same.

As to Property of Occupied Countries.

The first effort of the Control was the immobilization of the assets within the United States of the invaded countries, in order to prevent any beneficial interest in these assets from falling into the hands of the invaders, and also to protect American institutions from possible adverse claims which might arise in a dispute by the original owner of right and title and by someone who claimed to have secured that

[39] 7 FED. REG. 5205 (1942).

right or title. From its inception Foreign Funds Control never deviated from the principle that no matter what nationals of such a blocked country might do, in execution of documents or otherwise, no change of title or other beneficial interest —including imposition of any lien, pledge, or other right in property—could be accomplished without a Treasury License.[40] In general no transfer, release, or other disposition which would have the effect of reducing the assets has been permitted. It should be emphasized that it was change of title or beneficial interest, not mere payment, that the Treasury tried to prevent. If title could be transferred, the Control would be illusory for then Germany could through the black markets of the world dispose of title documents to persons who might be willing to furnish goods, services, or credit to the Axis, in exchange for a valid "title" to blocked assets even though knowing that these could not be utilized until a later date.

To the general policy of immobilization there were exceptions. The first was a temporary one permitting the completion of bona fide transactions which had been commenced before the time when the assets affected were blocked.[41] This, however, was obviously designed as a mere expedient to prevent undue harshness by the sudden imposition of the Order prohibiting transactions without a license. Other exceptions, which have continued, would apparently include payments from blocked funds which are required for the preservation of assets. Also when, prior to the date assets involved were blocked, liens thereon had been clearly established, either by the untrammeled consent of the parties or by due judicial process, the right in blocked funds was recognized. Use of blocked funds has been permitted for the necessary support of persons in the United States who owned or had some right in them,[42] to which may be added a similar though more indefinite category where denial of a license would cause undue hardship on the person who had by substantial evidence shown his right to the assets. The Treasury also pursued a wholly consistent but positive policy that all transactions helpful to the war effort were not only licensed but were encouraged and even directed.[43]

Consistent with these basic ideas of protection by immobilization, the Control repudiated the notion that a transaction affecting blocked funds should be licensed merely because it appeared to be harmless in itself and an American person or corporation of unimpeachable loyalty was the recipient of the blocked funds. Licensing by the Treasury must in many instances be an *ex parte* matter. All of the parties to the transaction could not be interviewed and, in any case where a doubt existed that the documents presented had been voluntarily executed by the blocked national whose account was to be charged, the Treasury would deny the requested

[40] See further discussion, in this article, under "litigated matters," *infra* p. 44.

[41] For example, see General License No. 45, 6 FED. REG. 2907, 3521, 3888 (1941) relating to checks and drafts, and General License No. 48, 6 FED. REG. 2908 (1941) relating to securities, both issued after the amendment of June 14, 1941, to EXEC. ORDER No. 8389.

[42] General License No. 11, 5 FED. REG. 1804 (1940), 9 FED. REG. 12954 (1944), covers many such cases. Persons with unusual needs may obtain special licenses.

[43] The power *to direct* was granted in the First War Powers Act, 1941.

transfer even if it came in the limited categories which might otherwise be licensed.

The question of the reliability and conclusiveness of evidence in support of an application for a license has always been a serious one. Disruption of communication facilities before the war and cessation of all forms thereafter made independent investigation of documents presented to the Control virtually impossible. Press releases put out from time to time by the Treasury[44] indicate the conviction that "title" was secured by the enemy in many and different ways; that documents were created or acquired to give apparent validity to transactions and were varied in character to fit the peculiar circumstances of each case. Though valid in form there was no assurance that the rights of the beneficial owner were not in fact disregarded. These documents included transfer and payment orders, checks, drafts, acknowledgments of indebtedness, assignments, and powers of attorney. They might come from proper custody; they might arrive mysteriously from unknown sources.

The Treasury recognized that this policy of keeping all blocked property immobilized until the Control could be completely assured of the propriety of the transfer frequently prevented bona fide transactions. Although this policy may have created hardship in certain instances, the Treasury appeared to believe that evils which could be prevented by such general immobilization must be considered as outweighing the hardships by limitations on bona fide transactions. It apparently recognized that payment of a claim could not in all probability readily be rectified after the war and it conceived its duty as twofold: to preserve the assets in this country for the true owner and to prevent the enemy from acquiring any benefit from the transfer of title to such assets.

The claims of creditors against nationals of the enemy-occupied countries presented a serious problem. Discussion of the position of the American creditors appears in the debates in Congress at the time of the May 7, 1940, amendment.[45] The Control appears to have denied many of this class of claims against blocked assets of the overrun countries, appearing to believe that such claims should await a time when all parties to the transaction could be heard. Then, too, the release of property of a blocked national, in the complete absence of knowledge of his financial position or what that ultimately might be, in order to pay the claim of one of his creditors, however legitimate and well documented that claim might be, could be prejudicial to other Americans having equally meritorious claims. Not all of the claims sought to be paid out of such blocked property were by Americans; foreigners either themselves or through resident assignees sought payment out of property blocked in the United States, often for transactions which were to have been performed abroad and were to have been paid in foreign currencies. Obviously not all foreign claimants had the opportunity of pressing their claims in America and pay-

[44] For example, see Press Release No. 31-28, April 21, 1942, DOCUMENTS (1944) *supra* note 23, at 122.

[45] See *supra* note 22. See also *Hearings on H. R. 4840 before Subcommittee No. 1 of the Committee on the Judiciary*, 78th Cong., 2d Sess. (1944), 97. (Testimony of Ansel F. Luxford, Assistant General Counsel, Treas. Dep't.)

ment of these claims might have favored the lucky rather than the diligent creditor. The payment of any such claims might give preferential advantage over all other creditors domestic or foreign.

Certain of the foreign countries have resorted to "protective vesting" of the assets of their nationals partially, at least it would appear, to defeat foreign claimants seeking to attach property in the United States.[46] In one case the court held that after the vesting order of the friendly foreign government, the property of its nationals could not be attached in a suit by an assignee of a foreign claimant.[47]

As to Property of Aggressor, Now Enemy, Countries.

Here too the Treasury adopted a policy of immobilization but for different reasons. Clearly at first it was to prevent Germany and her partners from securing any advantage from these assets in the course of aggression and to prevent their use in ways inimical to the United States. After the commencement of the war, this immobilized property was enemy property. A large amount of it has now been vested by the Alien Property Custodian.[48] Property not vested in the Alien Property Custodian remains blocked under Treasury regulation.

Much discussion has taken place concerning the disposition of enemy property after the war. Officials of the Treasury have indicated in informal speeches and in testimony that considerable study within the Treasury has been given to this problem. They have always been careful, however, to say that no one policy has been adopted by the Government or urged by the Treasury.[49] Except for certain bills introduced into Congress[50] there is no indication of a plan or policy for the treatment of these enemy assets nor, it may be said, of the treatment of claimants—either commercial creditors or those suffering war damages. It may be observed in considering various possibilities that potential American private claims not including war damage claims exceed the estimated value of Axis assets in this country.[51]

[46] Netherlands: Decree of May 24, 1940, STAATSBLAD No. A1, as amended by Decree of May 7, 1942; STAATSBLAD No. C34, issued in London, May 7, 1942, C. C. H. 1942, War Law Serv. (Foreign Supp.) ¶67,150. Norway: Provisional Order in Council of April 22, 1940, C. C. H., *supra* at ¶67,704. Belgium: Decree Law of March 19, 1942. See paragraph (6) of General Ruling No. 12, 7 FED. REG. 2991 (1942).

[47] Anderson v. N. V. Transandine Handelmaatschappij, 289 N. Y. 9, 43 N. E. (2d) 502 (1942), relating to the Netherlands decrees. The extraterritorial effect of the Norwegian decrees was upheld in England in Lorentzen v. Lydden [1942] 2 K. B. 202; defendant's appeal dismissed by consent, *id.* at 216. See Lourie and Meyer, *Governments-in-Exile and the Effect of Their Expropriatory Decrees* (1943) 11 U. OF CHIC. L. REV. 26 (1943); MCNAIR, LEGAL EFFECTS OF WAR (2 ed. 1944) 358. See also hereinafter, with regard to suits against blocked funds, p. 000.

[48] A yearly statement as to the property vested by the Custodian is contained in the Annual Reports of the Office of the Alien Property Custodian.

[49] *Hearings, supra* note 45, at 101; Orvis A. Schmidt, Acting Director, Foreign Funds Control, speech before the Thirty-First National Foreign Trade Convention, New York City, October 9, 1944.

[50] H. R. 3672, 78th Cong., 1st Sess. (1943)—bill providing for confiscation of German assets; S. 2038 and H. R. 5118, 78th Cong., 2d Sess. (1944)—bill providing a program for compensation of United States nationals for losses incurred since 1931; H. R. 5177, 78th Cong., 2d Sess. (1944)—bill to provide for the reimbursing of certain civilian personnel for personal property lost as a result of the Japanese occupation of Hongkong and Manila.

[51] See *Hearings, supra* note 45, at 104; Press Release No. 41-61, April 20, 1944.

Foreigners too have made claim to German property and in normal times many such claims could have been litigated in the United States. The Supreme Court has observed that there is no constitutional reason why the United States should be a collection agency merely because some foreign property was held within its jurisdiction against which non-resident aliens have made a claim, and that it is right and proper to pursue a policy in respect to these assets of more direct advantage to the United States and United States claimants.[52]

If at the end of the war all enemy property originally blocked is still available —except for transfers which have met the rigid test applied to all transfers of any blocked property—then the ultimate determination concerning their disposition can be effectual. The passage of a law may create liability but cannot re-create assets. In accordance with American tradition all ideas and proposals for the final disposition of enemy assets will be argued in the public press and on the floor of Congress and in any other way in which the government may legitimately be urged to adopt a particular policy. It is of concern to the Treasury that in so far as its obligation is involved the property will be available for this ultimate decision.[53]

As to Property of Blocked Neutral Countries.

The considerations of immobilization for preservation of property obviously do not apply to the property of the blocked neutrals. Here the problem is to prevent transactions which might be of advantage to the aggressor nations and in this respect the work of the Control is more in the nature of control of transactions than a blocking of property. At least one problem, however, arises in connection with neutral property not present in respect to enemy property and of much less significance in connection with the property of enemy occupied countries since they are treated under the policy of immobilization. That is, the common practice of European financial institutions to hold within the United States in their own names, funds and securities deposited with them by their clients—persons whose identity, nationality, whereabouts, and very existence cannot be determined until the end

[52] United States v. Pink, 315 U. S. 203, 228 (1942). The court said: "To be sure, aliens as well as citizens are entitled to the protection of the Fifth Amendment, Russian Volunteer Fleet v. U. S., 282 U. S. 489. A State is not precluded, however, by the Fourteenth Amendment from according priority to local creditors as against creditors who are nationals of foreign countries and whose claims arose abroad. Disconto Gesellschaft v. Umbriet, 208 U. S. 570. By the same token, the Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such creditors. And it matters not that the procedure adopted by the Federal Government is globular and involved a re-grouping of assets. There is no Constitutional reason why this Government need act as the collection agent for nationals of other countries when it takes steps to protect itself or its own nationals on external debts. There is no reason why it may not, through such devices as the Litvinov Assignment, make itself and its nationals whole from assets here before it permits such assets to go abroad in satisfaction of claims of aliens made elsewhere and not incurred in connection with business conducted in this country. The fact that New York has marshalled the claims of the foreign creditors here involved and authorized their payment does not give them immunity from that general rule."

[53] Schmidt, Speech, *supra* note 49: "It is clear that the controls of assets of the enemy countries must remain in effect until decision has been made as to the disposition of such assets."

of the war.[54] The beneficial ownership in such accounts may be neutral, enemy, or national of friendly occupied countries. Unless the evidence of beneficial ownership is clear beyond a doubt, trading in such accounts might be in derogation of all of the basic policies of the Control. Accordingly, the Treasury prohibited all transactions, including the receipt of dividends or interest, with respect to securities held in any account in the name of a financial institution located in a blocked country unless the custodian in the United States was furnished with adequate information as to the ownership of the securities, or they were placed in an account from which they could be withdrawn only under special license.[55]

General Policies of Economic Warfare

The economic warfare aspects of the Control were definitely announced at the Inter-American Conference on Systems of Economic and Financial Control, June 30, 1942. They are:

"(a) The complete severance of all financial and commercial intercourse, trade and communication, direct or indirect, between the United States and the Axis and Axis-dominated countries.

"(b) The prevention of all financial and commercial intercourse and trade between the United States and any country outside the Western Hemisphere which directly or indirectly benefits the Axis.

"(c) The prevention of all financial, commercial and trade transactions between the United States and any other American Republic which directly or indirectly benefit the Axis, including all transactions which benefit real or juridical persons within the American Republics whose influence or activity is deemed inimical to the security of the Western Hemisphere.

"(d) The elimination of all financial and commercial activities engaged in by real or juridical persons within the United States whose influence or activity is deemed inimical to the security of the Western Hemisphere."[56]

These objectives require no explanation and the licensing policies to carry them out are obvious.

[54] The question of who was the actual or beneficial owner of specific securities held by American banks in accounts for foreign banks had arisen in the United States almost immediately after the Munich agreement. Numerous suits for example had been commenced in New York by persons formerly residents of Czechoslovakia to obtain securities claimed by them to have been purchased through foreign banks and held by these banks for their account in New York. The New York banks knew and recognized only the foreign banks as their customers. Also there were suits to collect debts by persons whose claim was disputed by some national of Czechoslovakia. To protect financial and business institutions from double liability the New York legislature passed in the spring of 1939 two bills prepared by the Committee on Law Reform of the Bar Association of the City of New York. New York, L 1939, chs. 804, 805, CIVIL PRACTICE ACT §§51a, 287a to 287e, inc. Numerous cases, many of which are still pending, have been brought under these sections.

[55] General Ruling No. 17, 8 FED. REG. 14,341 (1943). See also Public Circular No. 21, 8 FED. REG. 845 (1943). When the ruling was issued, its effect was confined to the European neutral countries by exemptions granted on the accounts of institutions in other blocked countries, but with the liberation of those areas the Control is faced with the question whether their omnibus accounts should not likewise be broken down.

[56] U. S. TREAS. DEP'T, ADMINISTRATION OF THE WARTIME FINANCIAL AND PROPERTY CONTROLS OF THE UNITED STATES GOVERNMENT (1942). This document prepared for the Conference was for the confidential use of the delegates but was later made a public document by the Secretary of the Treasury.

So diverse have been the problems of Foreign Funds Control that it is difficult to summarize the objectives and policies as a whole. The basic policy is, of course, immobilization for protection, defense or economic warfare, but at the same time to encourage the use of property in any way advantageous to the war effort of the United Nations. This use is not necessarily inconsistent with immobilization for it is preservation of rights in property, not mere preservation of the form of the property, that is desired.

INTERPRETATION AND APPLICATION

It may be said that at the outset the Treasury Department was equipped with somewhat clumsy legal tools to carry on its work. These were improved as its operations progressed and conditions made the importance of its work evident. The Department at the inception of the freezing control, and at various later times, was faced with technicalities in applying the powers granted to the Secretary by the President under Section 5(b) of the Trading with the enemy Act. What these problems were and how they were resolved is useful in explaining the techniques adopted by the Treasury. Only the barest outline can be given but even this may lead to a better understanding of the form and language of the various documents which make up the freezing regulations.

Trading with the enemy Act.

The authority wielded by the Treasury stemmed from powers granted by Congress to the President under Section 5(b) of the Trading with the enemy Act. As first passed in 1917, Section 5 was but a part of a lengthy act designed to institute necessary controls in a then existing war and to further the prosecution of that war in other ways. The Act established an Alien Property Custodian who vested enemy property. It appears that Section 5(b) as originally passed was not primarily conceived as a property control nor even to immobilize property. That function was delegated to the Custodian. Section 5(b) was to prevent, except under supervision, certain transactions which were not otherwise controlled. Those financial transactions which directly or indirectly might be of advantage to the enemy and would normally be accomplished through usual banking channels were to be prevented.

The form of Section 5(b), and it may be said to some extent also its application, had been changed before it was invoked in 1940 for the purpose of freezing foreign assets. Between World War I and the inception of freezing control this section had been thrice amended.[57] It had twice been invoked for domestic emergencies—in the Banking Holiday[58] and in support of the Government's gold policy.[59] Now it was used to protect property within the United States of Norway and Denmark

[57] 40 STAT. 535 (1918); 40 STAT. 966 (1918); 48 STAT. 1 (1933).

[58] Proclamation No. 2039, March 6, 1933, 31 CODE FED. REGS. (1939) §120.1.

[59] EXEC. ORDERS No. 6102, April 5, 1933; No. 6111, April 20, 1933; No. 6260, August 28, 1933, 31 CODE FED. REGS. (1939) §§50.1 to 50.11, inc.

and their nationals—to assure that title or other interest in that property could not be acquired by Germany through the conquest of those countries.

Almost immediately after it was invoked in 1940 Section 5(b) was again amended. Yet in these various changes the basic framework of the section as emergency legislation under which financial transactions could be controlled remained very much the same. In 1917 the purpose was to prevent one country and its allies from obtaining advantage from transactions which it would wish to carry on. The country was Germany, then an enemy. On April 10, 1940 the United States was at peace; it had no recognized enemies. Again, however, the Act was directed against Germany, not then an enemy but an aggressor; the aim was to prevent transactions which Germany might desire to effect relative to the property of Norway and Denmark and their nationals.

Since the discretionary prohibitions contemplated in Section 5(b) were selective, the first problem to be met by the Treasury was one of definition. The intention was to protect the *property* of Norway and Denmark and their nationals from confiscation by conquest. Yet because of the form of Section 5(b), it was necessary to invoke prohibitions against defined *transactions.*

The Executive Order.

Executive Order No. 8389, as amended,[60] transferring authority under Section 5(b) of the Trading with the enemy Act to the Secretary of the Treasury naturally followed and incorporated the language of that section. The definition of the area in which power was to be exercised was accomplished by (1) limiting the Control to transactions ". . . if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect . . ." (Section 1) and (2) by specifying what classes or groups of persons were to be considered "nationals" of a country. A "national" of a foreign country was defined under four categories as follows:

"(i) Any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order.

"(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly, or indirectly, such foreign country and/or one or more nationals thereof as herein defined.

[60] As has already been indicated, the Executive Order was amended on numerous occasions, mainly to increase the list of countries "affected by the Order." In the present paragraph, and generally throughout the remainder of this article, the Executive Order referred to is the Order as it was amended on and after June 14, 1941. See note 33 *supra.*

"(iii) Any person to the extent that such person is, or has been, since such effective date, acting or purporting to act directly or indirectly for the benefit or on behalf of any national or such foreign country, and

"(iv) Any other person who there is reasonable cause to believe is a 'national' as herein defined." (Section 5E.)

The Executive Order had the further definitive explanation that "transactions [which] involve property in which any foreign country designated in this Order, or any national thereof, has . . . any interest of any nature whatsoever direct or indirect, shall include, but not by way of limitation (i) any payment or transfer to any such foreign country or national thereof, (ii) any export or withdrawal from the United States to such foreign country, and (iii) any transfer of credit or payment of obligation, expressed in terms of the currency of such foreign country." (Section 5A.) The Executive Order also prohibited "any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions." (Section 1F.)

In Section 2 of the Order all dealings in securities were prohibited when there was any evidence to show that the securities were or had been outside of the United States. Securities within the United States belonging to a blocked national could be dealt with only under license (Section 1E).

It must also be understood that the word "banking institution" had by definition lost its narrow and technical meaning as originally used in the Trading with the enemy Act and now included practically any person or institution by or through whom a financial transaction could be effected, including any person who held credits for others.[61]

And thus by the method of prohibiting transactions which affected the property of blocked nationals, no act whatever could be lawfully done without a license, by which any person could acquire, or any blocked national alienate, the title to or any beneficial interest in blocked property. Nor could any transaction be lawfully effected to accomplish such acquisition or alienation which was in evasion or avoidance of the Order, even if not expressly prohibited.

Treasury Regulations.

The Treasury issued "Regulations under Executive Order No. 8389, as amended." In these regulations there were three significant items. One was the definition of the words, "property," "property interest," and "property interests" which indicated the extreme breadth of the Control over the property of blocked nationals.[62] The second was the provision that the "custody" of a safe deposit box included not only the persons having access thereto, but the lessors whether or not the latter had

[61] EXEC. ORDER No. 8389, §5F; General Ruling No. 4, item (9), 5 FED. REG. 2133 (1940), 6 *id.* 2583, 3350 (1941), 8 *id.* 12,285 (1943).

[62] Regulations of April 10, 1940, as amended, 6 FED. REG. 2905, 3722 (1941), DOCUMENTS, *supra* note 23, at 16. Other important definitions relating to the Control are set forth by General Ruling No. 4, *supra* note 61.

access to the box.[63] The third was the requirement for a comprehensive report of the amount and kind of foreign-owned property in the United States by the persons or institutions having the custody, control, or possession thereof.

To some the control appeared complicated and instances of misunderstanding arose. It was not immediately realized by many that the system represented immobilization of property except under license. An inflexible immobilization had been used in the last war through the medium of vesting; many therefore believed that business could be carried on as usual except for such particular transactions as might be determined to be inimical to the general position of the United States, and that denial of a license would be the exception rather than the rule. Others believed that since the Act was written in terms of the prevention of listed and defined transactions that some dealings in or acts affecting the blocked property could be carried out without a license.[64] Another misconception was that merely payments by banks were prevented and that unlicensed transfers were not necessarily void. One court had occasion to correct this misconception.[65]

These confusions and misunderstandings caused demands to be made not only for explicit statements, as to the limits under which the Control *could* be exercised, but for definition of the boundaries within which the Treasury *would* exercise its control. In particular the question was continually asked what types of transaction would be licensed. The Treasury evidently realized that its first duty was immobilization of the property (for more than a year it was concerned only with the property of the invaded countries); yet it must maintain a system sufficiently flexible that property could be used should the transaction be deemed desirable. Complete immobilization was undesirable for various reasons and might even defeat the purpose of the Order which initially was to protect the true owners and not necessarily to deprive them of all use of their property.

As the list of countries protected by the Order grew with the rapid triumphal march of Germany through the countries of Europe, it seemed to many that the

[63] Doubt has existed whether the lessor or the lessee of the safe deposit box has custody. This provision of the regulations was to clarify the obligations of the parties in respect to property in safe deposit boxes. In Carples v. Cumberland Coal and Iron Co., 240 N. Y. 187, 148 N. E. 185, 186 (1925), concerning the relation of the lessor of a safe deposit box to a lessee, the Court made the following observation: "But however we may estimate the relative rights and possession of a safe deposit company and customer as between themselves, it was perfectly proper for the Court, so far as this aspect is concerned, to make the Order (for a sheriff to open the box) in question. If the property in the box is to be regarded as in possession of the customer, the Order was perfectly right and if, on the other hand, we regard the safe deposit company as in some respects a bailee and having possession of the box, it was still proper for the Court to make the Order which it did, and which with the levy of the sheriff thereunder will be ample protection to the company as against the defendant (the lessee)."

[64] Note, *The Effect of the Freezing Order in Civil Actions* (1942) 42 COL. L. REV. 1190.

[65] Commission for Polish Relief, Ltd. v. Banca Nationala a Rumaniei (National Bank of Rumania), 288 N. Y. 332, 43 N. E. (2d) 345 (1942), in which the Court said: "As read by the Special Term the Executive Order leaves open the way to an 'assignment of the defendant's claims against the banks that would carry the title.' . . . The Appellate Division likewise conceived of the Order as a command which 'operates exclusively *in personam* upon the banks.' We hold a different opinion in respect of this question."

intention of the Treasury to maintain a flexible policy could not be fulfilled. However, the Government was not forced to an inflexible policy for, by the system of general licenses, it relieved itself of close supervision of those areas in which little or no supervision was necessary.[66]

The Treasury continued its policy of examining transactions as they arose. It was explicit in rules and regulations on particular problems but it did not bind itself to a fixed course of action. The Department appeared to believe for good reason that it must apply the Executive Order as a prohibition of any financial transaction affecting the property of blocked nationals which in its judgment was contrary to the public interest in the emergency. By the Executive Order the discretion of the Secretary of the Treasury in approving or denying a license was final.[67]

The Trading with the enemy Act, as amended, on which the authority of the Treasury was based, was a delegation of powers to be exercised in emergency—war or peace, international or domestic. As applied to this emergency, it stood alone; it was not part of any other system. The property of blocked nationals must be dealt with in accordance with the general policies of the United States under this law or not at all: there was no other grant of power. The First War Powers Act of 1941 was not passed till war had actually been declared; no property had yet been intrusted to an Alien Property Custodian.[68] Emergency power not ample to meet an emergency; executive power ineffectual to protect the country against unforeseen danger could have been but another example of the weaknesses which critics have charged were inherent in democratic government, high-minded in purpose, well-meaning but deficient in execution.[69]

The Treasury therefore applied the purpose and principle of this emergency law to the particular emergency in hand. Construing the purpose and principle of a law to a specific circumstance arising is not a new and unique method of legal application and determination.[70] Deciding only whether a particular set of facts presented is within or without a concept is a technique not unfamiliar in the deliberations of the Supreme Court.[71] This was the technique that the Treasury employed in carrying out its obligations. A flexible control, capable of change to meet a changing situation, for accomplishing obvious objectives, was the Treasury goal.

[66] See discussion *infra* pp. 38 ff.

[67] EXEC. ORDER No. 8389, §7.

[68] See footnotes 38 and 39 *supra* and text thereto.

[69] 1 BLACKSTONE, COMMENTARIES *49 ff.

[70] *Id.* at *61: "For, since in law all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, lex non exacte definit, sed arbitrio boni viri permittit." (The law does not nicely prescribe, but gives latitude to the judgment of a virtuous [learned] man.)

[71] Twining v. New Jersey (1908) 211 U. S. 78, 100: "This court has always declined to give a comprehensive definition of it [due process of law], and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decision of cases as they arise."

Administration of the Control Through Federal Reserve Banks.

The Control had to be in a position to function promptly in all parts of this country, although its activity was largely in New York. It immediately established its work through the Federal Reserve Banks, each one of which acted as a field office in its own district. Applications were directed to the Federal Reserve Bank, in the district of the person or institution desiring to apply for the license.[72] Through the twelve Federal Reserve Banks, immediate contact was made by the Treasury with the approximate number of 15,000 banks in the United States, any one of which at any time might have a client who desired to effect a transaction prohibited except under license.[73] In this way, all blocked bank accounts within the United States were immediately affected, as well as most security accounts and a majority of safe deposit boxes. Also any customer of a bank whether or not a blocked national could have immediate information from his own bank regarding his duties and liabilities with respect to blocked property. New regulations or changes in previous ones could immediately be communicated throughout the country.

The Treasury has recognized that banks throughout the United States have had imposed upon them a heavy responsibility which in general they have cheerfully borne.[74] Throughout the country there has been an increasing degree of efficiency in carrying out the licensing program and in the reporting of property. It is natural that some mistakes have been made but the Treasury has generally taken a lenient view of unintentional technical violations. It has, however, necessarily demanded that a high degree of diligence and care be exercised in matters relating to blocked property.

With its authority established and a system selected for disseminating detailed regulations, the Control thereupon issued from time to time, as the situation required, not only specific licenses, but also general licenses, general rulings, public interpretations, and public circulars, and other miscellaneous documents, each referring to some particular phase or problem. In all, the Control has issued some 150 public documents, many of which were accompanied by an explanatory press release. The more bitter critics of the Foreign Funds Control insisted that even these press releases were used as regulatory documents, and remarks were heard about "government by press release." Sarcasm is seldom fair criticism. The press release was a necessary document since the Control was often dealing with complicated transactions not within the daily experience of the generality of citizens.

[72] Regulations of April 10, 1940, as amended, §130.3, 6 FED. REG. 2905, 3722 (1941), DOCUMENTS, *supra* note 23, at 16.

[73] The Reserve Banks also circularized most brokers and a selected list of business corporations and other persons specially interested in the Control.

[74] Addresses of Norman E. Towson, Assistant Director of Foreign Funds Control, U. S. Treasury Dep't, before the New York City Bank Comptrollers and Auditors Conferences, November 18, 1941, and before the New Jersey Bankers Association at Princeton, N. J., November 28, 1941; Randolph Paul, Acting Secretary of the Treasury, Letter dated December 17, 1943, addressed "To Banks and Other Financial Institutions in the United States," THE AMERICAN BANKER, December 22, 1943.

Obviously not all of the documents issued by the Treasury for the control of foreign funds can be considered separately and, fortunately, it is not necessary that they should be for an understanding of the Control. Knowledge of the operations of the Control can better be achieved by examination of the programs instituted. These for convenience can be divided into two great groups; one group being those programs particularly directed to the protection of property of blocked nationals within the United States, and the other group to the economic defense and warfare programs of the Control which to a large degree sought to affect operations outside of the United States. This division is merely for convenience in examining the work of the Control and is somewhat artificial, since the work at least after Pearl Harbor showed a unity in operation in which each part supported each other part.

PROGRAM OF THE CONTROL RELATING MORE PARTICULARLY TO BLOCKED PROPERTY WITHIN THE UNITED STATES

General Licenses.

The area which the Control undertook to regulate was broad; its basic policy immobilized except under license *all* property within the United States of *all* nationals of every country blocked under the Order. However, within this broad area were divisions in which but little and, in some cases, no supervision was necessary. By a system of general licenses permitting certain categories of transactions in blocked property the Control achieved flexibility without impairing its ultimate power. A license could be contracted or expanded by the addition or remission of conditions. Where it was deemed necessary, the Control could keep itself advised by means of required reports. Changes were frequently made in general licenses and upon occasion they were revoked.

The general licenses can be divided into three major groups: (1) as to persons; (2) as to geographic areas; and (3) as to particular types of transactions.

As to Persons. Most individual nationals of blocked countries who had been living within the United States for periods of time had the Control remitted under general licenses by which they were designated "generally licensed nationals."[75] They were regarded for practically all purposes as though not nationals of any foreign country.[76] However, where the transactions or affiliations of any one such person came under suspicion, the general license as to him was revoked; this mean-

[75] General License No. 42, 6 FED. REG. 2907 (1941), 7 *id.* 1492 (1942); General License No. 42A, 6 *id.* 6104 (1941), 7 *id.* 468, 1492 (1942); General License No. 68, 6 *id.* 3726 (1941), 7 *id.* 1492 (1942); and General License No. 68A, 6 *id.* 6454 (1941), 7 *id.* 305, 1854 (1942), 8 *id.* 4877 (1943); Press Releases No. 16, No. 19, and No. 29, DOCUMENTS, *supra* note 23, at 111, 112, 118. Originally, comparable freedom for nationals in the United States was achieved through the definition of "national" in the Executive Order. The technique was not inappropriate at a time when protection of property formed the chief aim of the Control, but it obviously would have been a serious hindrance in the period of economic defense which was signalized by the amendment of June 14, 1941, to the Order.

[76] General Ruling No. 4, 5 FED. REG. 2133 (1940), 6 *id.* 2583, 3350 (1941), 8 *id.* 12,285 (1943).

ing of course that he reverted to his position as "blocked national" and had to secure a special license for every transaction thereafter, except those permitted to all.

The problem of Americans returning to this country after residence abroad had made them by definition "nationals of foreign countries" was likewise met by a general license.[77]

A general license was granted to all persons living in the United States, of whatever nationality and regardless of how long they had been here, which enabled them to secure a certain amount from their own blocked funds within this country for living expenses.[78] If the amount permitted under the general license was, in a particular case, insufficient for special needs as for example, to continue the education of their children in American schools, special applications could be made to increase the amount.

The effect of this system of general licenses was, that under supervision, the conditions of living within the United States could continue in a practically normal manner for the vast majority of persons within the United States who were blocked by the Order. Not only was it of advantage to the blocked nationals themselves but also to Americans dealing with them. It was feared by many in the first imposition of the Control that every person in business would be forced to the impossible task of determining positively that everyone with whom he dealt was not a blocked national and that every transaction in which he engaged was free from blocked interest. After the system of general licenses had been in force for some time the Treasury publicly declared that "persons dealing with residents of the United States may now assume that such residents are not blocked unless they are affirmatively on notice to the contrary."[79]

As to Geographic Areas. A general license was given for trade with certain regions, collectively called "the generally licensed trade area."[80] With respect to this area, no further or special license was required for normal trade with nationals of blocked countries, unless their names appeared on the "Proclaimed List of Certain Blocked Nationals."[81] The regions within the trade area were either specific blocked areas, not controlled by the Axis or by Axis-dominated governments, or non-blocked areas whose governments were favorably disposed toward the United

[77] General License No. 28, 5 FED. REG. 2807 (1940), 6 *id.* 3349, 4663 (1941).

[78] General License No. 11, 5 FED. REG. 1804 (1940), 9 *id.* 12,954 (1944). Special rules were applied to internees and persons similarly under surveillance after the advent of war.

[79] Press Release No. 30-44, February 23, 1942, DOCUMENTS, *supra* note 23, at 118. It would seem that a question may remain as to civil liability. The Treasury has declared that every unlicensed transaction in blocked funds is void. General Ruling No. 12, 7 FED. REG. 2991 (1942). If an inadvertent transaction was conducted within the United States in reliance upon the statement quoted in the text, would such a transaction be considered valid? Some protection is offered to the holder of property who on order pays the property not knowing a license is required. General Ruling No. 12A, 8 *id.* 1833 (1943). This, however, by its terms does not protect the ultimate recipient.

[80] General License No. 53, 6 FED. REG. 3556, 3946, 5180 (1941), 8 *id.* 4876, 6595 (1943), 9 *id.* 2084 (1944). A standard of conduct for American concerns in Latin America in relation to the license was promulgated in Public Circular No. 8A, 8 *id.* 4877 (1943).

[81] This List is further discussed *infra* p. 56.

States. The license was particularly useful to traders in relation to the latter group of countries since it would have been difficult to ascertain whether or not foreign purchasers or sellers were blocked nationals. Moreover, application for and granting of specific licenses when required would inevitably have caused delay in shipment.

The granting and continuation of these trade licenses depended upon the political situation with respect to each nation involved and upon the degree of likelihood that such nations and their nationals were engaging or might engage in transactions for the benefit of the Axis, or inimical to the interests of the United States.

The "generally licensed trade area" of the world at present includes: (1) the American Republics; (2) the British Commonwealth of Nations; (3) the Union of Soviet Socialist Republics; (4) the Netherlands West Indies; (5) the Belgian Congo and Ruanda-Urundi; (6) Greenland; (7) Iceland; (8) Syria and Lebanon; (9) Caledonia, Tahiti and the French Establishments in India.[82] Trade with these areas remained subject to export licenses, the granting of which was not under the supervision of Foreign Funds Control. However, close cooperation is maintained between the Treasury and the agencies granting these licenses.[83]

The neutral European countries, Sweden, Switzerland, Spain and Portugal, were also granted general licenses for the transactions of their governments and their nationals.[84] Subject to the conditions of the licenses, a transaction could be consummated under official certification or through the central bank for the benefit of a national of the country to which the license was granted. These licenses were granted after the governments of the countries involved gave adequate guarantees and assurances to the United States that the terms and conditions of the general licenses would be strictly adhered to. The basic condition imposed was the obvious one; that under the license no transactions by, on behalf of, or pursuant to the direction of any blocked country or blocked national (other than the country to which the general license was granted or national thereof), could be consummated.[85]

As to Transactions. Many types of transactions carried on within the United States, even though on behalf of nationals of the Axis nations themselves, were not in any way inimical to the purpose of the Control, and for these it was deemed undesirable to require individual licenses. The very first general license issued by the Control was of this nature and permitted a person in the United States owing

[82] An elaborate program permitting trade with China on restrictive terms compatible with the fact that much of its commercial area was occupied by an aggressor was provided for by General License but was rendered largely abortive by the outbreak of war. General License No. 58, 6 FED. REG. 3723, 5802 (1941), 9 *id.* 2849 (1944).

[83] Regulations—Restricted Exportations and Importations, T. D. 50433, as amended, 6 FED. REG. 3672, 6585 (1941), 7 *id.* 304, 2777 (1942), 9 *id.* 1003 (1944).

[84] General License No. 49, Sweden, 6 FED. REG. 3057 (1941), 9 *id.* 2084 (1944); General License No. 50, Switzerland, 6 *id.* 3057 (1941), 9 *id.* 2084 (1944); General License No. 52, Spain, 6 *id.* 3404 (1941), 9 *id.* 2084 (1944); and General License No. 70, Portugal, 6 *id.* 4046 (1941), 9 *id.* 2084 (1944).

[85] U. S. TREAS. DEP'T, *supra* note 56, at 12.

money to a blocked national to pay the funds into a blocked banking account in the name of that national.[86] A large number of unobjectionable transactions were thus facilitated. The license did not, however, authorize any foreign exchange transaction or any payment to a blocked account which was a part of another or different transaction requiring a license. By these licenses the blocked nationals were not required to bear the risk of fluctuations of the market, nor was a debtor forced to remain a debtor with the responsibilities of holding blocked funds. The banks of course, into which accounts were paid, held them as blocked funds and could make no payments without a license.

Many other general licenses relating to transactions were similarly concerned with permitting blocked nationals and their agents to manage or liquidate property and to meet the necessary expenses and taxes.[87] Some, however, covered distinct fields of considerable importance. The questions of living expense remittances to blocked countries,[88] of handling estates and trusts,[89] and of servicing life insurance policies[90] were all dealt with extensively by transactional licenses.

Blanket licenses were given to certain reputable institutions within the United States to carry on specific routine matters. Under such a license a bank, for example, might collect dividends, issue letters of credit, make payment of drafts and the like. The conditions in the blanket were sufficiently restrictive to limit activities to the type of transaction which had Treasury approval.

General Rulings.

The general rulings define types of transactions prohibited or permitted under the freezing regulations. A few rulings were answers to inquiries and were wholly interpretative.[91] Some related to temporary situations or to matters important to only a few persons. Others, however, were the medium through which were instituted broad programs of the Control.[92] It is impossible to consider all of the problems dealt with through the general rulings. The principal programs, however, initiated, defined or amplified by the general rulings are significant and may be examined, rather than the rulings themselves, for understanding of the work of the Control.

[86] General License No. 1, 5 FED. REG. 1616, 1695 (1940), 6 *id.* 2907 (1941). See also General License No. 1A, 6 *id.* 5180, setting a similar procedure for securities accounts.

[87] E.g., General License No. 2, 5 FED. REG. 1695, 2309 (1940), 6 *id.* 3214, 5180, 6405 (1941), 9 *id.* 2083 (1944); General License No. 4, 5 *id.* 1696, 2132, 2806 (1940); General License No. 27, 5 *id.* 2807 (1940), 6 *id.* 3214 (1941).

[88] General License No. 32, 5 FED. REG. 3531 (1940), 6 *id.* 748, 5467 (1941), 8 *id.* 1834 (1943), 9 *id.* 7379 (1944); General License No. 32A, 9 *id.* 1581, 3489, 5975, 10559 (1944); General License No. 33, 5 *id.* 3634 (1940), 6 *id.* 748, 5468 (1941); General License No. 75, 6 *id.* 5804 (1941), 7 *id.* 147 (1942), 9 *id.* 2849.

[89] General License No. 30, 5 *id.* 2863 (1940); General License No. 30A, 7 *id.* 8633 (1942). See also Public Circular No. 20, 7 *id.* 8632 (1942).

[90] General License No. 86, 8 FED. REG. 9320 (1943).

[91] The function of such rulings was later carried on by "Public Circulars" and "Public Interpretations."

[92] Two important general rulings are discussed in other parts of this article: General Ruling No. 17, *supra*, p. 31, and General Ruling No. 11, *post*, pp. 57-58.

Program as to Securities. It was realized at an early period that if the Control were to be effective in preventing assets of invaded countries falling into the hands of invaders from being liquidated by them for their own benefit, a method had to be found to prevent the disposition of looted securities.[93] No efforts made within this country could prevent the physical seizure of securities which might be within an invaded country. The problem was to prevent recognition within the United States of the change of title or other beneficial interest of a blocked national in any securities whether the securities themselves were within or without the United States.

The first part of a program to accomplish these aims related to the prohibition of the transfer or dealing with respect to any security registered in the name of a national of any of the countries which were blocked. No registrar or transfer agent within this country could, without a license, change the registration of any security registered in the name of a blocked national.[94] It did not matter even if documentary evidence indicated that transfer had been made or contemplated long before the date of invasion. If the request for change of registration came after the blocking of the country of which the registered owner was a national, that blocked national remained the registered owner unless a license were granted. Although originally commenced as protection of property of the invaded countries, the rule extended to all blocked nationals. It will be observed, however, that these measures met but part of the problem since they did not affect bearer securities. To meet this particular problem the program included an overall system of examining securities brought into the United States.[95] The import controls were based upon the premise that it would be insufficient if the prohibitions of the Control related only to importation of securities from the blocked areas, since securities could enter the United States through the channels of neutral nations which did not maintain safeguards considered adequate.[96] Beginning in June, 1940, the Control provided that all securities entering the United States from any foreign country must be deposited in a Federal Reserve Bank from which they could be released for general use and circulation only upon satisfactory proof that they were free from any Axis taint.[97] Here again the Control was in close cooperation with other agencies of the Government and particularly the United States Customs and Post Office officials, the former of whom examined the effects of incoming passengers and the latter of whom saw that securities contained in incoming mail were deposited with a Federal Reserve Bank.

[93] For an extended discussion of the problem, see U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 20.

[94] General Ruling No. 3, 5 FED. REG. 2133, 2284 (1940).

[95] General Ruling No. 5, 5 FED. REG. 2159 (1940), 7 *id.* 3770 (1942), 8 *id.* 12286 (1943).

[96] U. S. TREAS. DEP'T, *supra* note 56, at 21.

[97] The provisions of General Ruling No. 5 were later extended to securities coming from the Philippine Islands and the Canal Zone [General Ruling No. 7, 5 FED. REG. 3747 (1940)] but were made inapplicable to securities from Great Britain, Canada, Newfoundland, or Bermuda (General Ruling No. 5, paragraph (6)) because of the controls maintained by the authorities in those areas.

Securities thus held by a Federal Reserve Bank, if not released, could nevertheless be transferred to any domestic bank to be held in a special blocked account.[98] Dividends and interest could be collected and placed in the account and the securities could even be sold if the proceeds went into the account.[99] Banks might also deduct the established amount of their fees for the handling of a security account.

In part the problem of dealing with securities physically located abroad was simplified by a certain European practice of requiring the placing of a tax stamp on securities held in such countries. This stamp in itself showed that the securities came from or had been held in a foreign country. The Executive Order (Section 2A) expressly prohibited any transactions in such securities except under license. When the title of stamped securities had been satisfactorily established, the Control attached to them an official certificate called Form TFEL-2, which signified that the securities could be traded freely.[100] So effective was the control of stamped securities that Germany, it is known, took a special census of all securities that could not be thus identified.[101]

Another part of the program related to securities issued in the United States by blocked countries of Europe. From time to time payments of coupons on such securities became due and, if matured, the face amount of the securities became payable. Certain of the countries occupied by the enemy which had such dollar issues outstanding had funds within the United States which the issuing country desired to use in maintaining the fiscal service on these securities. The Treasury has, in general, been willing to authorize the use of these funds for the payment or redemption of such securities. However, the question immediately arose as to which securities might legitimately be paid and which could not be paid except, of course, into blocked accounts. Here again, by the use of Form TFEL-2, the Control facilitated the operation of normal payment of coupons and the redemption of securities while at the same time it prevented the Axis from realizing on seized securities.[102]

It was also recognized that the sale of looted securities might be made from outside of the United States to a person within the United States, and to prevent this the freezing order prohibited the acquisition by or transfer to any person within the United States of any security or evidence thereof which was outside the United States.[103] This prevented the transfer by cable or otherwise; the destruction of the security and the request for reissue within the United States.

[98] General Ruling No. 6, 5 FED. REG. 2807 (1940), 6 *id.* 3174 (1941), 8 *id.* 6595 (1943).

[99] General License No. 29, 5 FED. REG. 2807 (1940), 6 *id.* 3174 (1941), 7 *id.* 9119 (1942), 8 *id.* 6595 (1943).

[100] General License No. 25, 5 FED. REG. 2671 (1940), 6 *id.* 3214 (1941).

[101] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 22.

[102] Public Circular No. 6, 6 FED. REG. 4730 (1941). The technique of requiring Form TFEL-2 to be affixed was also employed to prevent looting of Philippine securities by the Japanese. General Ruling No. 10, 7 *id.* 305 (1942); Press Release No. 29-56, January 14, 1942, DOCUMENTS, *supra* note 23, at 115.

[103] EXEC. ORDER No. 8389, §2A(2). Acquisition of securities in Great Britain, Canada, Newfoundland, or Bermuda, and to a limited extent of those in the generally licensed trade area was eventually permitted by general license. General License No. 87, 8 FED. REG. 10656 (1943).

Currency.

For many years there has always been within the countries of Europe a large amount of American currency, accumulated through the normal methods of trade and the sending of cash remittances from the United States. Seizure by the Axis of this currency, if there were means of redeeming it, would have given substantial purchasing power to the Axis. The question, therefore, was how to make American currency outside the United States valueless and prevent it from coming into the United States. The Treasury engaged upon a program which, to those who failed to understand its import, caused great astonishment. The Department did everything practical to depreciate the value of the American dollar bill in Europe and elsewhere in the world.[104] Of course, if the Axis could find means of getting looted dollars into the United States, they would be as good as any other. There would be no way of identifying them. A general ruling was put out that currency brought into the United States must be deposited in a Federal Reserve Bank.[105] This was later combined with the analogous ruling relating to securities.[106] To avoid undue hardship a very small amount of currency was permitted to be brought into the United States for personal expenditure. Again the Customs Service and the Post Office Department have been the first line of defense in preventing importation.

In those friendly countries where the American dollar was circulated more or less in regular trade, the Treasury announced that it would entertain applications for the release of currency forwarded by such countries but would not permit it to be redeemed if Axis taint was not proven to be absent.[107]

Litigated Matters.

It is not necessary to infer what attitude the Treasury assumed in regard to matters in litigation, for that Department has been at pains to explain its position, in court,[108] in the press[109] and in a general ruling.[110]

A brief explanation of the situation which the Treasury faced in regard to litigation involving blocked nationals and blocked funds is necessary for an understanding of the Treasury's position. Most transactions for which a specific license would be required were voluntary; a blocked national desired to enter into some transaction by which he would receive funds or pay them out. In considering an application for a license to effect such a transaction, the Control had before it a

[104] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 24.

[105] General Ruling No. 6A, 7 FED. REG. 2083 (1942), 8 *id.* 12287 (1943).

[106] General Ruling No. 5 (as amended September 3, 1943), 8 *id.* 12286 (1943). A similar program was also established with respect to checks and other negotiable instruments. General Ruling No. 5A, 8 *id.* 9320 (1943).

[107] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 25.

[108] Commission for Polish Relief, Ltd. v. Banca Nationala a Rumaniei (National Bank of Rumania), 268 N. Y. 332, 43 N. E. (2d) 345 (1942).

[109] Press Release No. 31-28, April 21, 1942, DOCUMENTS, *supra* note 23, at 122; AMERICAN BANKER, December 11, 1942, p. 3, col. 2.

[110] General Ruling No. 12, 7 FED. REG. 2991 (1942).

"pay order," *i.e.*, a consent by the party to be charged. In other cases where some one claimed a right to enter into a transaction to receive funds from a blocked national, the blocked national might not have been in a position to give his consent or he might have denied any obligation. Had the Treasury granted a license, which was purely permissive, to the claimant, the claim still would not have been paid, for it could not have been enforced. To enforce an unadmitted or disputed claim the judgment of a competent court is necessary.

The Treasury in general refused to consider any application for a license solely to assert a claim but insisted as a condition precedent to consideration of an application, either that the blocked national to be charged had consented to the transfer or that a judgment had been entered against him.[111] A license at any time before final judgment would constitute a Treasury "permit" for the completion of the transaction which might have no legal justification and in any event without entry of a judgment could not be enforced against the blocked national or his property. The Treasury created no prohibitions against a suit wherein the judgment, which might thereafter be entered, could be satisfied only out of blocked funds; neither did it assist a claimant to bring such a suit.

If the blocked national against whom suit was brought were within the United States, jurisdiction could be obtained by personal service. A serious problem, however, arose in the event that the defendant, a blocked national, was not within the United States, so that no jurisdiction *in personam* could be obtained, but jurisdiction *in rem* (or as sometimes denominated, *quasi in rem*) could be obtained by attachment or other appropriate process directed against his property within the jurisdiction. Such a case would arise when the defendant, let it be assumed, was in enemy occupied territory.

Without a license, was attachment possible under the freezing regulations? The Executive Order, as officially interpreted by the Treasury, forbade any transfer of blocked funds without a Treasury license.[112] "Transfer,"[113] as used, included the creation of any right, or any interest, in blocked funds in any way derogatory to the right, title or interest which the blocked national had in the property in question prior to the imposition of the freezing regulations. Therefore, an attachment or even a judgment which might follow could not do as to blocked property what the owner thereof could not voluntarily do.[114] What then were the rights of litigants seeking

[111] "Indeed the Treasury regards the Courts as the appropriate place to decide disputed claims and suggested to parties that they adjudicate such claims before applying for a license to permit the transfer of funds. The judgment was then regarded by the Treasury as the equivalent of a voluntary payment order without the creation or transfer of any vested interest, and a license was issued or denied on the same principles of policy as those governing voluntary transfers of blocked assets." Brief for United States, *amicus curiae*, p. 14, in the Polish Relief case, *supra* note 108.

[112] General Ruling No. 12, 7 FED. REG. 2991 (1942).

[113] *Ibid.*, par. (5)(a).

[114] *Ibid.*, paragraph (4): "Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; provided, however,

to secure satisfaction of claims out of blocked property of a national who was not personally subject to the jurisdiction of the court, and what were the rights and obligations of the officer whose duty it was under normal process of court "to attach" blocked property? It seemed axiomatic that the rights of the officer (sheriff, marshal or constable) in property sought to be attached could not become by such process greater than the rights of the owner. By the blocking of the owner's property his title was not defeased; he could express his wish to transfer, he could execute a purported assignment valid in form or take other action looking to a transfer, but he could create no interest whatever in his property, he could alienate nothing, without a license. Since the blocked national could exercise but limited powers in respect to his property, was his remaining or residual interest attachable? Was the right or interest which the levying or attaching officer acquired merely the privilege to apply for a license, since this was one privilege which clearly the owner of the property retained, or were other interests acquired? In such a case as here considered, instituted without personal service, or process deemed its equivalent, the jurisdiction of a court must be acquired, if at all, by the attachment of the defendant's property. The question, therefore, immediately arose, could jurisdiction be founded upon "seizure subject to license," upon "hypothetical seizure," or could a court acquire jurisdiction only in the event that it had "dispositive dominion"[115] over the blocked property involved.

Certain other questions arose in this type of litigation which need not here be considered since they were problems of the applicability or interpretation of the procedural laws of the particular state in which the action was brought.[116]

The Treasury confined itself to questions involving the freezing order as applied to litigation. The position of the Treasury may be reduced to simple propositions:[117]

(1) No legal proceedings could give any interest whatever in blocked property in the absence of a Treasury license.

(2) No license was required for any one who sought to institute judicial proceedings for the ultimate determination of a disputed question, even though the suit involved a blocked national and blocked funds.

Whether or not a court could acquire jurisdiction by attachment or by other similar process directed against blocked funds was for the court itself to decide. The Treasury said:

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that no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license." See also note 111 *supra.*

[115] The defendant in the Polish Relief case, *supra* note 108, had contended that no attachment could be valid unless the Court had "dispositive dominion" over the property.

[116] These problems related in particular to requirements (1) as to the method of giving notice to the defendant of the institution of an action against him (by attachment of his property) and (2) as to the entry of a default judgment if he failed to appear or answer.

[117] General Ruling No. 12, 7 FED. REG. 2991 (1942). Also, see Brief for United States, *amicus curiae,* in the Polish Relief case, *supra* note 108.

". . . The Government believes that the interest of private litigants in state courts can be served without interference with the freezing control program. However, the interest of the Government is paramount to the rights of private litigants in this field and should this Court be of the view that under the New York law there cannot be a valid attachment of the limited interests* herein suggested, then the Government must reluctantly take the position that in the absence of further authorization under the freezing control, there can be no attachable interest under New York law with respect to blocked assets."[118] *[The limitation imposed by the freezing order on the attributes of ownership in property was on the power of alienation. The exercise of this power was contingent on the issuance of a Treasury license.]

The case in which the Treasury filed the brief containing this statement, had been commenced by attachment against blocked funds in New York. The attaching creditor, a domestic membership corporation, was the ultimate assignee of a foreign claimant. The defendant had not been personally served but had appeared specially to contest the jurisdiction of the court. In deciding the fundamental question whether or not jurisdiction could be acquired by attachment of blocked funds, the Court divided sharply 4 to 3.

The division was not on the question of the power of the Foreign Funds Control to prevent transfers (both majority and minority concurred as to that proposition) but on the question, whether or not the Court could acquire jurisdiction by an unlicensed attachment. The minority was of the opinion that an attachment could not, in the absence of a license to transfer the property, have sufficient validity to give jurisdiction over the case to the Court, and conversely, a decision that an attachment without such a license had sufficient validity for this purpose would be an indication that some rights in the blocked property had been transferred by the attachment process and thereby unlicensed trading in blocked assets would be permitted. The minority said (at page 349):

"What the plaintiff is seeking here is a res sufficiently illusory not to fall within the all-inclusive prohibition of the Executive Order and at the same time to be sufficiently substantial to afford a basis for jurisdiction. In my opinion such inconsistency seeks the impossible."

In short the minority believed there could be no attachment of blocked funds whatever without a Treasury license.

The majority held that the rights of the blocked national in his property even without a Treasury license were an "attachable interest." The majority said (at page 347):

". . . The lien of an attachment is always hypothetical in some degree. A 'seizure subject to license' was, we think, sufficient for the purpose of jurisdiction in rem over the deposits in question. . . .

". . . As amicus curiae, the government of the United States informs us of its decision that the levies of this attachment do not offend any national policy implied by the Executive Order. We do not presume to contradict this executive determination. . . ."

[118] *Ibid.*, at p. 53 of Brief.

The decision clearly marks the line between the functions of the Court and those of Treasury. In absence of a pay order, *i.e.* consent of the parties, two elements are required as conditions precedent for a transfer of title to blocked assets. (1) A determination dehors the freezing order of the legal right of the plaintiff to compel a transfer of the defendant's property, (2) a determination that the transfer of the property is not contrary to public policy as expressed in the Executive Order and Regulations under Section 5(b) of the Trading with the Enemy Act. The Courts were not empowered to make the determination as to the latter question. The Treasury has not presumed to make a determination of the former.

The Court decided merely the question before it, which was that there was an attachable interest in blocked funds. It did not decide other questions which might arise by reason of this determination. What rights does an attachment creditor retain in the event that no license is granted for the satisfaction of his judgment out of the blocked funds? It appears that the Treasury has seldom licensed delivery to a sheriff of attached blocked property and that where it has done so, it was prepared to license also the judgment if obtained. Its position has been that no delivery can lawfully be made to a sheriff of blocked property without a license.

Other questions likely to arise relate to the rights of a subsequent attaching creditor who might receive a license for payment of a judgment which would exhaust the blocked property available. Could such a judgment be satisfied in view of the fact that there was a prior judgment on attachment against the same fund for which no license had been granted? Likewise, if a license were granted, could an attachment garnishee on direction of the owner of the attached property make payment without liability under the laws of the state where the attachment action was pending? Also what is the effect upon an outstanding attachment of a subsequent vesting order? Similar questions which might arise can easily be imagined. Consideration of the general policy of immobilization pursued by the Treasury as well as examination of explicit statements appearing in the documents relating to litigation, leads only to the assumption that the Treasury's attitude would be that neither attachments nor judgments in anywise change the rights or interest in blocked funds, unless and until a license is granted. The Treasury's position has thus been stated:

". . . While the Federal restrictions may leave some scope for the operation of state attachment laws, *e.g.*, insofar as the attachment provides a jurisdictional basis for judgment, the attachment under state laws must fall short of creating any legal interest or relation that collides with the Federal regulation of foreign-owned property. The creation of any legal interest or relation by attachment beyond what could be created by unlicensed voluntary assignment conflicts with the applicable Federal law. . . .

"The Federal concern is that the effect, if any, of the attachment be in complete subordination to the Federal control over the assets involved. . . ."[119]

[119] *Ibid.*, at 38.

No attached blocked funds have been paid during the war without a Treasury license.[120] It must, however, be admitted that some matters relating to the future or ultimate rights of the parties to litigation involving blocked funds are not clear. One could not say with assurance what rights, if any, will carry over into the future. If without further clarification, freezing control should cease, it would seem that confusion would be inevitable. Many litigants would necessarily seek a decision whether proceedings in attachment other than those which have ended in a judgment licensed for satisfaction,[121] are null and void, or whether attaching creditors upon the remission of the control revert to such rights as they would have had if the attachment had been against other than blocked funds, or whether they have other or different rights.[122] It is hoped that these questions of supreme interest to parties in litigation can be authoritatively settled before freezing control shall have ended.

The Census of Foreign Property within the United States—Form TFR-300.

During the period prior to Pearl Harbor a project to secure information basic to the whole freezing program was undertaken. With the freezing of Norway and Denmark, the Treasury required reports of the assets within the United States belonging to those countries and their nationals. Reports were similarly required for the assets of other countries as those countries were frozen until June 14, 1941. At this time, as aforesaid, all occupied European countries not previously frozen, the European aggressor nations, and the European neutral nations, were blocked under the Order. A few weeks thereafter, China and Japan were likewise included.

The situation as of June 14, 1941, made imperative a comprehensive survey to determine the amount of foreign property existing in the United States, not only for the countries blocked, but for *all* other countries as well.[123] Certain reasons are obvious why this census should apply to the property of non-blocked countries, even though friendly, as well as those affected by the Order. The course of the

[120] It should be noted that an appropriate license at any time will validate or make enforceable a transfer and this is true even if a prior application for a license by the same person (or another) for the same transfer has been denied. (General Ruling No. 12, Sec. 3.) Thus even if the payment of a judgment out of blocked funds has been denied, it seems clearly the Treasury's position that a license at any future time would enable the judgment to be enforced.

[121] The Treasury filed a brief *amicus curiae* with the New York State Court of Appeals in the case of Singer v. Yokohama Specie Bank Ltd. and Elliott v. Bell, as Superintendent of Banks of New York, further emphasizing its position as to transfers of blocked property. On Nov. 30, 1944, the Court handed down a decision. Shortly thereafter the defendant Elliott v. Bell, as Superintendent of Banks, made application for re-argument. A further memorandum was submitted by the Treasury in support of this application. Since the matter is thus pending before the Courts as of the time of this article, no comment is made on the issues involved.

[122] It does not appear that the Treasury has made any announcement concerning actions in admiralty. It may also be noted that under General Ruling 12, "the term 'property' is broad but by and large does not include mere chattels or real property." Press Release No. 31-28, DOCUMENTS, *supra* note 23, at 122, 125. As to liquidations, see "Blocked Businesses Other Than Those Vested," *post* p. 54.

[123] Regulations of April 10, 1940, as amended, 6 FED. REG. 2905, 3722 (1941). Later, provision was made for reporting on Form TFR-300 with respect to property of Japanese nationals residing in the United States [Public Circular No. 4A, 7 *id.* 383 (1942)]; of nationals of the Philippine Islands when they were invaded [Public Circular No. 4B, 7 *id.* 847 (1942)], and of various kinds of nationals in situations of special interest to the Treasury [Public Circular No. 4c, 7 *id.* 7274, 7428 (1942)].

war and what nations might still be overrun could not then be foreseen. Chains of title might run through various countries including friendly, unblocked countries. Axis agents might be operating in any country.

The census was to show not only the amount of property within the United States but the identity of the persons holding it, their relation to it, and the type and kind of property. This census was to be of a scope and detail unprecedented in the United States. The Treasury regulation implementing the Executive Order provided for reports on Form TFR-300 and a public circular[124] was issued, supplemented by questions and answers as to the manner and method in which these reports should be made.[125]

Reports were required from all persons holding or controlling any type of property in which there was any foreign interest, direct or indirect. All corporations or other business organizations issuing shares, bonds, or other securities were required to report the interest of each foreign national as appeared from their books. Every agent or representative in the United States of any foreign country, or of any foreign national, had to report any property which he held for his principal. Where two or more nationals had an interest in the same property, a separate report was required for each national.

Also all "nationals of foreign countries" living within the United States were required to report with respect to any property subject to the jurisdiction of the United States in which they had an interest. The effect of this requirement, however, was greatly reduced by certain general licenses.[126] No one was obliged to report if he had been domiciled in and a resident of the United States at all times on and since June 17, 1940, except nationals of certain invaded countries whose period of uninterrupted residence had to begin at a somewhat earlier date (the date of freezing as to them).

In order to determine the amount of property which might have been transferred from the beginning of freezing, and to enable the government to trace such transfers should that be necessary, all persons reporting were required to specify the amount of property on two separate dates, June 1, 1940, and June 14, 1941. If reportable property was held on one date but not on the other, a report was nevertheless required. No one was required to report property less than $1,000 in value excepting property of unascertainable value, such as patents.

[124] Public Circular No. 4, 6 FED. REG. 4196 (1941).

[125] "Questions and Answers regarding United States Treasury Department Form TFR-300, Series 'A' through Series 'I,' prepared after Consultation with the Treasury Department by the Foreign Exchange Committee, New York, National Foreign Trade Council, Inc., New York, National Council of American Importers, Inc., New York, and by Insurance Representatives." (Indexed and reprinted for distribution with an Introduction by Guaranty Trust Company of New York.) Various committees or groups representing business interests consulted the Treasury on specific questions of interest to them regarding reporting requirements. The questions and answers were published in various journals and publicized through various associations. They were then collected and published as above cited.

[126] General License No. 42 (as issued June 14, 1941), 6 FED. REG. 2907 (1941); General License No. 68 (as issued July 26, 1941), 6 *id.* 3726 (1941). See also General License No. 28 (as amended September 9, 1941), 6 *id.* 4663 (1941).

Contrary to some misunderstanding at the time, this was not an "informer's report." The persons required to report were only those who themselves had some interest in, or obligation with respect to, property in which a national had an interest. No one was asked, nor was it even desired that any one should give to the Treasury his suspicions or beliefs as to property held by another person in which a national of a blocked country might have an interest.

The Treasury received nearly 600,000 reports, including 150,000 on securities registered in the names of nationals of foreign countries; 135,000 on bank accounts, 65,000 on securities held in custody by banks and brokers; and 10,000 on safe deposit boxes in which nationals had an interest. In all, it was found that the value of foreign property within the United States was about $13,000,000,000, and more than $7,000,000,000 was the property of blocked countries.[127] The significance of this report in the work of the Control generally and in conection with particular matters, as the location of materials strategic in the war effort, has already been the subject of magazine and newspaper comment. Now it is to be hoped that the Treasury will see fit to publish such information concerning the property within the United States as may not be of confidential nature, in order that it may be more readily available to the Congress and other branches of the Government in preparation for post-war settlements and rehabilitation, and to those persons and corporations, generally, who would find the information valuable for such purposes as planning post-war trade.[128]

Vesting.

On February 16, 1942, one of the new powers in the First War Powers Act was exercised for the first time when the Secretary of the Treasury, to whom the President had delegated all powers under Section 5(b), as amended by Title III of the Act, vested in himself ninety-seven percent of the outstanding shares of General Aniline and Film Corporation of Delaware, an organization doing annually a business of about $60,000,000, employing some 8,000 persons, and engaged in the manufacture of materials vital to the prosecution of the war. The announcement made at the time by the Secretary of the Treasury indicated he considered that the property taken under the first vesting order was owned beneficially by enemies,[129] although a majority of the shares of stock vested was registered in the name of Swiss and Dutch corporations and a few only in the names of German citizens.

The fact that most of the stock of the company was in names other than those of German nationals was not at all surprising. Anonymous investment within the United States had been a policy of foreigners for years prior to the war. Persons fearful of confiscation endeavored to place their property out of reach of the Axis,

[127] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 39.
[128] In the Spring of 1943, the Treasury took a census of American property abroad, *post* p. 58.
[129] U. S. TREAS. DEP'T, Press Service No. 30-33, February 16, 1942.

not only by transference to the United States or other countries believed to be safe, but by concealing the ownership as well. Anonymous investment was, however, not confined to persons fearful of the Axis, but, as is now known, was employed by the Axis itself and its supporters, who doubtless made anonymity a defense against the possibility of future conflict with America. Some of these efforts at concealment were sinister and hid the intention of the Axis to secure control of important American business units as safe investment for its funds or for an ulterior use.

Concealment of Ownership.

Whatever the purpose, be it sinister or innocent, many devices were used which, as the inevitable war approached, became more devious and complicated, and were limited only by the ingenuity of frightened businessmen or unscrupulous Axis agents, as the case might be. Much sympathy may be expressed for the acts of innocent victims of aggression, but such devices for concealment tended to interfere with the war effort. Whether for economic defense of the United States, which would include the protection of the property interests of those who could not protect themselves, or for economic warfare, to injure the Axis wherever possible, the government was forced to look through the device, whatever it might be, and act in accordance with the findings of beneficial ownership.

Limitations in the Trading with the enemy Act as used in World War I had been removed. This broadening of the power of seizure was necessary for the protection of the United States in World War II[130] since the devices for concealment, frequently involving chains of title through several countries, were many and various.[131] These may be grouped conveniently under five general headings.

(1) *The Trust Device.* The technique here was to place stock ownership in trust with American citizens, but the apparent beneficial ownership was in citizens of neutral countries. In some instances the trust was of the spendthrift variety, in order to give a greater semblance of completely divorcing control from beneficial ownership. The ostensible beneficial owners within neutral countries might, in turn, be mere nominees for others unknown. Beneficiaries might shift, and new ones spring into existence upon the happening of certain events or upon appropriate declarations by the trustee.

(2) *The Unregistered Share Device.* This was probably the most common device employed for large holdings.[132] The technique used was to transfer to holding companies in various countries shares of stock, frequently representing majority ownership and control of American corporations. The stock of the holding companies usually consisted of bearer shares. Thus, any record of the ultimate owner-

[130] See Albert S. Davis, in N. Y. L. J., December 19, 1941, p. 2048; December 22, 1941, p. 2082. Also see Lourie, *"Enemy" Under the Trading with the Enemy Act and Some Problems of International Law* (1943) 42 MICH. L. REV. 384.

[131] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 30; Press Release No. 30-33, February 16, 1942.

[132] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 30.

ship was not available. Moreover, trading in such shares between the various holding companies was frequent, resulting in further confusion and concealment. In many cases the corporation in question never did have sufficient assets to purchase the American shares. In some instances, where the shares of the holding company were themselves held by another holding company, the shares of the first corporation were of the partly paid variety common in European corporate finance, and the second neutral corporation did not and never was intended to have sufficient assets to meet a call if made on such shares.

(3) *The Second Generation Device.* The technique here was to place, in the name of a person born in the United States of foreign parents, the property belonging to the parents or in which they had an interest. Children of very tender years, but American citizens because they were born within the United States, were found to have held nominal control over substantial organizations. This device was employed almost exclusively in Japanese business enterprises.

(4) *Control by Personal Fealty or Relationship.* The buying and selling of shares in American corporations by and between groups of persons all having blood or financial relations with certain other groups, which, in turn, controlled foreign corporations, was another pattern.[133] This appears to have been common in the chemical industry where the blocked foreign interest was primarily German. There was frequently no relation between the value at which these shares were sold on these "wash" sales, and the market or book value thereof.

(5) *The Option Device.* Corporate shares, particularly of newly formed corporations, were optioned to some foreign person or corporation, so that, although the record ownership might remain wholly American, the power of the optionee was the principal factor in the conduct of the business.

Fear has been expressed that the drastic action of vesting might create injuries to American citizens. The Secretary of the Treasury, by his announcement in connection with the first vesting order, indicated that the property was beneficially owned by others. Suppose he was mistaken. Is the claimant left without recourse? The order of vesting contained the two following provisions:

"Such property and any proceeds thereof shall be held in a special account pending further determination of the Secretary of the Treasury. This shall not be deemed to limit the power of the Secretary of the Treasury to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return or compensation should be made.

"Any person not a national of a foreign country designated in Executive Order No. 8389, as amended, asserting any interest in said shares of stock or any party asserting any claim as a result of this Order may file with the Secretary of the Treasury a notice of his claim, together with a request for hearing thereon, on Form TFVP-1 within one year of the date of this Order, or within such further time as may be allowed by the Secretary of the Treasury."[134]

[133] *Id.* at 30.

[134] Vesting Order pursuant to Section 5(b) of the Trading with the enemy Act, as amended, February 16, 1942, 7 FED. REG. 1046 (1942).

Also authority exists that when property is taken for public use under conditions constitutionally requiring compensation, an implied contractual right exists against the United States.[135] This is expressed in a bill now before Congress.[136] To deny that the government, particularly in wartime, could seize any property, by whomever owned, would be to limit the sovereignty of the United States, and to say that it no longer could exercise the right of eminent domain. The ultimate ownership, whether enemy, friendly alien, or loyal American, would merely determine the category for final treatment.[137] The vesting in itself was not confiscation. It was but another type of control wherein the title of the property was transferred to the United States. The property or the value thereof was still to be disposed of under whatever overall determination the government should adopt.[138]

Blocked Businesses Other Than Those Vested.

As this discussion relates only to the Foreign Funds Control, comments concerning the functions of the Alien Property Custodian are omitted. It may, however, be said that all functions not specifically exercised by the Alien Property Custodian over blocked business enterprises were retained by the Treasury. After the commencement of the war, the control over blocked foreign businesses became of greater significance. The control was exercised in various ways. In the first instance, a "do business" license could be granted by the Treasury. Some times such a license was not renewed or was revoked, in which event a liquidation would be the only recourse, and for this a license would be issued.[139] These liquidations were conducted as any liquidation of a business might be, but under Treasury supervision, and the funds secured from the liquidation were placed in blocked accounts in the name of the liquidated corporation. Usually, at the time of the issuance of a liquidating license, representatives of the United States were placed on the premises of the enterprise to supervise the liquidation process. This was desirable to prevent any person from removing or destroying property and, in particular, books and records. Altogether over five hundred businesses have thus been liquidated.

Another method of control was by the use of interventors.[140] In some cases a government representative was placed in a corporation to supervise its activities. His duty was to supervise but he could recommend any step to be taken, such as the vesting of the stock or other interests of undesirable individuals which would

[135] Jacobs v. United States, 290 U. S. 13 (1933); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U. S. 327 (1922); cf. Yearsley v. W. A. Ross Construction Co., 309 U. S. 18 (1940); Hamburg-American Line Terminal & Navigation Co. v. United States, 277 U. S. 138 (1928); Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290 (1911); see the Tucker Act, 24 STAT. 505 (1887), 28 U. S. C. (1940 ed.) §§41(20), 250.

[136] H. R. 5031, 78th Cong., 2d Sess. (June 15, 1944).

[137] Russian Volunteer Fleet v. United States, 282 U. S. 481 (1931).

[138] For further discussion as to the legal significance of vesting, see McNulty, *Constitutionality of Alien Property Controls, infra,* this symposium, p. 135; Dulles, *The Vesting Powers of the Alien Property Custodian* (1943) 28 CORN. L. Q. 245.

[139] U. S. TREAS. DEP'T, *op. cit. supra* note 56, at 34.

[140] *Id.* at 36.

then come under the control of the Alien Property Custodian. He might recommend the discharge of certain officers, the supervision of various trade activities, and other matters.

One other method was the reorganization of an enterprise without blocking.[141] Frequently it was possible to obtain the cooperation of the officers or directors of a blocked business enterprise. It must be understood that a great many businesses, whose activities thus had to be supervised, were essentially American owned. In some cases the American interest was dominant almost to the point of being exclusive. However, by reason of trade relations with Axis firms, as for example for the use of certain patents, the company might have become too dependent upon the Axis. As far as possible, the financial interests of American citizens, who had invested their money in such corporations, were preserved. In general, the effect of these methods of control was to eliminate from all business enterprises within the United States any influence or activity which was deemed inimical.

Patents.

The Treasury's census of foreign property in the United States disclosed some 65,000 foreign-held patents and agreements relating to patents. Until several months after the outbreak of the war, the control of blocked interests in such property rested in the Treasury Department, which proceeded in a manner consistent with its general policies toward blocked property.[142] In the spring of 1942, the President announced a policy that patents controlled directly or indirectly by the Axis would be made available for war preparation and other national needs of the United States.[143] Several months later a system for the use of these patents was announced by the Alien Property Custodian, who indicated that his policy was to release any restrictions which they might have imposed on American industry.[144] This program is outside the scope of these remarks but it may be added that the Treasury Department and the Alien Property Custodian have coordinated their efforts.[145] Fields not covered by the Custodian, such as the control of American patent interests in blocked countries, are dealt with by the Treasury.[146]

Directive Licenses.

Title III of the First War Powers Act contained a grant of power not encompassed in the Trading with the enemy Act of 1917. This was the power to issue directive licenses, which enabled the Secretary of the Treasury, under the President's

[141] *Id.* at 37.

[142] Public Circular No. 5 (as issued September 3, 1941), 6 FED. REG. 4587 (1941); General License No. 72 (as issued September 3 and amended October 23, 1941), 6 *id.* 4586, 5468 (1941).

[143] Leo T. Crowley, *Hearings before the Committee on Patents,* 78th Cong., 2d Sess., on S. 2303 and S. 2491 (1942) part 3, p. 1185.

[144] General Orders Nos. 2 and 3, June 15, 1942, 7 FED. REG. 4634, 4635 (1942). See U. S. ALIEN PROPERTY CUSTODIAN, PATENTS AT WORK (1943), *passim.*

[145] Public Circular No. 5 (as amended November 17, 1942), 7 FED. REG. 9481 (1942); General License No. 72 (as amended November 17, 1942), 7 *id.* 9481 (1942); General Orders Nos. 11, 12 and 13, 7 *id.* 9475-9476 (1942).

[146] General License No. 72A, 7 FED. REG. 9480 (1942).

delegation of authority, to direct any person or institution holding blocked property to dispose of it. It was found that property of various kinds, much of it of a strategic nature in the war effort,[147] could not be sold by the person having custody thereof, as he lacked the authority to make such a sale. Under the directive license without liability upon this holder the property could be placed, through sale, in normal commercial channels. Particular property might go directly to the Army or Navy or to persons having immediate need for it in the war effort. Also the moving of material, which could not otherwise have been sold, had the advantage of making space available in warehouses and on docks to meet the increased demands for the war effort. Not infrequently, it was found that a payment out of blocked property or a sale would be in the interest of the national who was the owner. Proceeds from a sale would be placed in a blocked account to the credit of the national having an interest in the property.

Important as this power has been on occasion, it has been used but sparingly.

HEMISPHERIC DEFENSE AND WORLD-WIDE CONTROLS IN ECONOMIC WARFARE

The Control recognized at an early period that economic defense could not be carried out merely by supervision of property within the United States. Control, in some manner, of transactions outside of the United States became, of course, more important after the declaration of war. The British had promptly recognized these factors and had published the "Statutory List," commonly known as the "black list," with whom persons under British control might not trade.

The Proclaimed List of Certain Blocked Nationals—"Black List."

By presidential proclamation,[148] the United States on July 17, 1941, created such a list,[149] which was officially known as "The Proclaimed List of Certain Blocked Nationals," but also commonly came to be referred to as the "black list." Supervision of financial and commercial transactions with the persons, natural or juridical, on the list was maintained by the Treasury Department,[150] although the list was published by the Secretary of State, acting in conjunction with the Secretaries of the Treasury and Commerce, the Attorney General, the Administrator of Export Control (now the Administrator of the Foreign Economic Administration) and the Coordinator of Commercial and Cultural Relations between the American Republics (later the Coordinator of Inter-American Affairs). Trading with any person on this list was subject to the penalties of the Trading with the enemy Act. It will be observed that in declaring a person outside the jurisdiction of the United States, wherever he might reside, to be a blocked national, the United States, in many instances, was by sanctions or embargo extending its authority over trade, to

[147] Press Release No. 29-37, January 4, 1942.

[148] PROCLAMATION No. 2497, 6 FED. REG. 3555 (1941).

[149] *Id.* at 3557.

[150] See General License No. 53, 6 FED. REG. 3556, 3946, 5180 (1941), 8 *id.* 4876, 6595 (1943), 9 *id.* 2084 (1944); Public Circular No. 12, 7 *id.* 334 (1942); Public Circular No, 18, 7 *id.* 2503 (1942); Public Circular No. 18A, 8 *id.* 4877 (1943); and Press Release No. 6, July 17, 1941, DOCUMENTS, *supra* note 23, at 105.

persons who were nationals of blocked countries solely by reason of facts other than citizenship or residence. The proclaimed list has been revised from time to time[151] and the names of certain persons who ceased their activity which was the occasion for their inclusion in the list have been deleted from it. Others have been added and as of the publication of January 12, 1945, this list contains 14,534 names. In this manner, a large amount of trade which might have been of benefit to the Axis has been prevented and the facilities within the United States, financial or otherwise, have been denied to the Axis and its well-wishers.

Inter-American Conference on Systems of Economic and Financial Control.

The most likely non-European area available for Axis financial operations and indirect trade for its benefit was South America and, although the "black list" was not confined to South America, the whole question of proper economic and financial controls and their integration throughout the western hemisphere was thoroughly explored in the Inter-American Conference on Systems of Economic and Financial Control held in Washington, commencing June 30, 1942.[152] Extensive recommendations were adopted for a coordinated program to further the war effort by preventing Axis use of facilities in this hemisphere.[153] Subsequent to the conference most nations of South America, in cooperation with the United States increased the effectiveness of their controls for their individual and collective defense and in general have extended hearty cooperation to a common end. The measures instituted by each country varied in accordance with the conditions and the degree of control deemed necessary. Nevertheless a fundamental unity of great mutual advantage has been created throughout a large part of the Western Hemisphere. Particularly has this unity and coordination been useful in the successful operation of the proclaimed list. Through this device particularly, and in correlative ways, three-cornered trade with the Axis through countries in the western hemisphere has been prevented.

Communications and Censorship.

The role of the Treasury relating to trade and communications with enemy nationals must not be overlooked. By the declaration of war, Section 3(a) of the Trading with the enemy Act was invoked, prohibiting trade and communication with the enemy.[154] The power under this section was delegated to the Secretary of the Treasury[155] and by him was integrated with that under Section 5(b) of the Act so that a license to consummate a transaction granted by the Treasury covered

[151] Revision VIII issued September 13, 1944, 9 FED. REG. 11389 (1944), is the most recent revision to which, as of this writing, the latest Cumulative Supplement is that of January 12, 1945, 10 *id.* 581 (1945).

[152] PAN AMERICAN UNION, PROCEEDINGS OF THE INTER-AMERICAN CONFERENCE ON SYSTEMS OF ECONOMIC AND FINANCIAL CONTROL (Congress and Conference Series No. 40, 1942) *passim;* U. S. TREAS. DEP'T, *op. cit. supra* note 56, *passim.*

[153] PAN AMERICAN UNION, *op. cit. supra* note 152, at Appendix J, p. 137.

[154] Section 3 of the Act of October 6, 1917, 40 STAT. 412, 50 U. S. C. APP. (Supp. 1941-1943) §3.

[155] General License under Section 3(a) of the Trading with the enemy Act, December 13, 1941, 6 FED. REG. 6420 (1941); see note 39 *supra* and text thereto.

the inception of the program relating to trade and communication, the director of censorship issued a complementary ruling in order that the work of the Office of Censorship in this connection should be coordinated.[157]

The general policy of the Treasury was to deny licenses for communication.[158] In addition, the Department was careful to prohibit Latin-American subsidiaries of American corporations from communicating with enemy nationals.[159]

United Nations Declaration.

The United Nations Declaration of January 5, 1943, gave warning to the world and particularly to persons in neutral countries that the United Nations reserve their rights to declare invalid any transfers in respect to property in or belonging to the occupied countries and their residents.[160] This obviously has been a great deterrent to the Axis in attempting to realize on confiscated property.

Thus in so far as it has been possible to do so, efforts have been made to use the financial weapon, so effectively used by Germany, to protect the interests of the United States and the United Nations and to wage war against the Axis.

Census of American Property Abroad—Form TFR-500.

As the area of the Control widened and particularly after the commencement of the war, the government's need for detailed knowledge of American interests and relationships abroad constantly increased. Such information was required not only for the operation of the Foreign Funds Control but for the work of other governmental agencies which involved economic, financial, and commercial relations with foreign countries and their nationals.[161] The Treasury, therefore, under a special regulation[162] required reports on Form TFR-500 with respect to all property in

[156] General Ruling No. 11, 7 FED. REG. 2168, 9119 (1942), 8 *id.* 12287, 7379 (1943); Press Release No. 30-79, March 18, 1942, DOCUMENTS, *supra* note 23, at 119.

[157] Office of Censorship, Communications Ruling No. 1, 7 FED. REG. 2172 (1942).

[158] Public Interpretation No. 4, DOCUMENTS, *supra* note 23, at 99.

[159] Public Circular No. 18, 7 FED. REG. 2503 (1942); Press Release No. 30-90, March 30, 1942, DOCUMENTS, *supra* note 23, at 121.

[160] Declaration of January 5, 1943, Regarding Forced Transfers of Property in Enemy-controlled Territory, DOCUMENTS, *supra* note 23, at 15; also Declaration on Gold Purchases, February 22, 1944, *ibid.*, 9 FED. REG. 2096 (1944). The viewpoint was confirmed by the United Nations at the Bretton Woods Conference; see *Official Text of Final Act of the United Nations Monetary and Financial Conference, Held at Bretton Woods, N. H., July 1 to 22, 1944* (Resolution VI), The Commercial & Financial Chronicle, July 27, 1944, pp. 388, 392-393.

[161] See *American-Owned Property Abroad*, an article prepared in the Treasury Department, appearing in FOREIGN COMMERCE WEEKLY, July 10, 1943, p. 3.

[162] Special Regulation No. 1, as amended, 8 FED. REG. 7438, 9744, 14277 (1943); detailed instructions for reporting were contained in Public Circular No. 22, 8 *id.* 7465, 9745, 14277 (1943) and an abridged circular of instructions. These circulars were supplemented by sets of questions and answers issued with the approval of the Control. See *Questions and Answers Regarding United States Treasury Department Form TFR-500*, AMERICAN BANKER, June 10 and August 10, 1943 (prepared by the Foreign Exchange Committee, New York); see also "TFR-500 Census of Property in Foreign Countries" (mimeographed), questions and answers prepared by the National Board of Fire Underwriters; also, "Questions and Answers" prepared by the Treasury Department covering reporting problems of interest to refugees from enemy and enemy-occupied countries.

foreign countries in which any person subject to the jurisdiction of the United States had an interest on May 31, 1943. This report applied not only to tangible property but to all intangible property issued or created by foreign countries or by persons within such countries, as, for example, bonds issued by a foreign government whether or not payable in dollars. Also currency or coin, financial securities, and negotiable instruments issued or created by the United States or any agency or person within the United States, came within the scope of the census whenever such property was situated in a foreign country or held in the custody of a person in a foreign country on the reporting date.

Here too it is hoped that the Treasury will at an appropriate time make readily available as much of this information as may be of significance to the Congress and to American business and financial interests. It appears that such a comprehensive digest may perhaps be expected as the Treasury, as of April 20, 1944, already has given a brief preliminary tabulation of the value of American owned property in foreign countries.[163] These figures were stated to be preliminary only and should be used with caution. They show that American individuals and firms have an investment of some $13,300,000,000 in foreign countries. Of this the American holdings in six enemy countries total $1,775,000,000—interests in Germany $1,290,000,000, in Italy $265,000,000, and in Japan $90,000,000. These figures, the Treasury warned, include in substantial amounts the assets of refugees here from blocked countries. These investments in enemy countries, as stated by the Treasury, more than triple the $450,000,000 known Axis holdings within the United States. The census figures also show that persons within the United States owned more than $2,000,000,000 in areas which the Axis has occupied.

THE REMISSION OF CONTROLS

The Treasury now faces a question as important as any which it has yet met—the remission of controls.[164] The policy of the United States in this respect is not yet fully apparent but already some preliminary steps have been taken.[165] Many of the policies followed by the Treasury must gradually be changed as the wartime conditions for which they were adopted change to peacetime conditions. It is clear to every one that remission of controls as soon as possible is highly desirable. It seems equally clear, however, that since sudden and complete return to normal conditions is not possible, sudden and complete cessation would be undesirable. Some have visualized continuation over a period of time as a part of exchange control.

[163] Press Release, No. 41-61.

[164] The speech of Orvis A. Schmidt, Acting Director, Foreign Funds Control, delivered before the Thirty-First National Foreign Trade Convention, Hotel Pennsylvania, New York City, October 9, 1944, shows the Treasury's concern with this problem and at the same time is the basis for any interpretation of Treasury attitude indicated in this section.

[165] General License No. 32A, 9 FED. REG. 1581, 3489, 5975, 10559 (1944), authorizing certain remittances to specified liberated areas in Sicily and Italy; Public Circular No. 25, 9 *id.* 12580 (1944), exempting from operation of General Ruling No. 11 certain communications with liberated Italy and certain acts and transactions; amendment of November 4, 1944 to General Ruling No. 11, 7 *id.* 9119 (1942), deleting portion of France within continental Europe from definition of "enemy territory."

While features which would normally be found in a system of foreign exchange control are not absent, this was not the purpose or function of the Foreign Funds Control and factors which might make necessary an exchange control should be considered separately and not confused with the main problems of "unfreezing."

For brief consideration of the problems involved, the property affected may again be considered under the three groups of (1) those countries occupied by the enemy, (2) the enemies themselves, and (3) the blocked neutral countries. The first category is most difficult as the purpose of remission combines two ideas—to assist the country to return to normal trade and production as rapidly as possible yet at the same time not permit the accomplishment of those transactions in respect to its property successfully prevented up to this time. A sudden complete remission of controls would lose in part the value of protection to property of invaded countries since many of the transactions for which licenses have been refused might still be executed if freezing were remitted. Not only would this be unfortunate for the beneficial owner of the property but the holder of the property, in most cases a bank or brokerage house, would be under the difficulty of deciding at its peril whether or not to execute the orders.

The enemy property does not present such a difficulty as one may assume that this will continue to be held until final determination is made for its disposition.

As to the blocked neutrals the principal difficulty is that of identifying and segregating the assets beneficially owned by the enemy. What policies will be adopted and what means to carry them out in relation to preventing the probable distribution throughout the world of German assets seeking avoidance of identification cannot now be said. One of the Bretton Woods resolutions recommended to all governments immediate measures to prevent the concealment of any assets belonging to, or alleged to belong to, the enemy, its leaders, their associates and collaborators, pointing out that efforts were now being made to conceal assets and to perpetuate German influence and power for future aggrandizement and world domination.[166] This resolution stated that transfers were being made to and through neutral countries.

These and other questions involving justice to the nations overrun in this war, efforts to aid these countries in their struggle back to freedom, and prevention of concealment by the Axis of assets throughout the world, make the remission of the controls a problem that merits immediate and thorough consideration.

[166] Resolution VI of the United Nations Monetary and Financial Conference, Bretton Woods, July, 1944, *supra* note 160.